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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

CITY OF MIDDLETOWN, CITY OF MIDDLETOWN PLANNING BOARD and JOSEPH DeSTEFANO,

Petitioners,

-v-

REGIONAL ECONOMIC COMMUNITY ACTION PROGRAM, INC., and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a healthy and productive individual, who has been treated and alcohol-free for at least 30 days, may be deemed "disabled" by virtue of his or her status as a "recovering alcoholic"?

2. Whether a challenge under the disability statutes to a planning board's decision denying a special use permit to construct 2 large residential facilities for recovering alcoholics in an industrially-zoned district right next to an active rail line in the middle of a small city's last industrially developable corridor – when the city and planning board rejected all other residential proposals, save one, in the industrial districts of that rail corridor in the past 20 years, and where that city has demonstrated substantial and undisputed commitment to residential facilities for the disabled – warrants a trial due to (1) a discussion during the planning board hearings, mostly by non-planning-board members, concerning the city's and neighboring towns' fair share obligations in providing services to special needs populations, and (2) the planning board's approval of a nearby office and warehouse complex that included a Head Start program for children?

3. Whether a claim for retaliation lies under the disability statutes for not providing loan monies when it is undisputed that provision of those monies would have violated federal regulations?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATEMENT OF NOTIFICATIONS 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 3

POINT 1

The recovering alcoholics who would have resided at RECAP's facilities were not "disabled" 3

A. Determining whether the "impairment" of alcoholism constitutes a "disability" 3

B. The proposed RECAP clients 4

C. "Substantial limitation" versus "mitigating measure" 5

Page

D. "Impairment" as "physical or mental" 6

E. The "impairment-substantial limitation" distinction 8

F. The "individualized assessment" requirement and class-type actions 9

POINT 2

The Planning Board's denial of the Special Use Permit did not violate the FHA, ADA or Rehabilitation Act as a matter of law 10

Background 10

The Middletown Zoning Ordinance 11

The 1994 Planning Board hearings 12

Argument 18

A. The disparate treatment prima facie case 19

B. Legitimate justification 20

C. Pretext 22

1. The statements 22

1-a. The debate between the Mayor and RECAP Officials 22

1-b. Isolated comments 23

Page

1-c. The Novesky comment 24

1-d. Chairman Arluck's summary 24

1-e. The Swierski statement 25

1-f. Miner's comments 26

2. Differential treatment 26

POINT 3

The retaliation claim was correctly dismissed as a matter of law 28

CONCLUSION 30

TABLE OF CONTENTS TO APPENDICES

Page

Appendix A - Opinion of Hon. Charles L. Brieant, USDJ, dated September 25, 2000 ..... 1a

Appendix B - Final Opinion of Hon. Robert Sack, USCJ, entered February 19, 2002 ..... 22a

Appendix C - Fair Housing Act (FHA), 42 U.S.C. § 3601, *et seq.* 49a

Appendix D - Americans With Disabilities Act (ADA), 42 U.S.C. § 12101, *et seq.* 58a

Appendix E - Rehabilitation Act, 29 U.S.C. § 701, *et seq.* 61a

TABLE OF AUTHORITIES

Cases: **Page**

Albertsons, Inc. v Kirkingburg, 527 US 555 (1999) 9

Bragdon v Abbott, 524 US 624 (1998) 3, 10

Brandt v Village of Chebanse, 82 F.3d 172 (7th Cir. 1996) 21

Bryant Woods v Howard County, 911 F.Supp. 918 (D.Md. 1996), *aff'd* 124 F.3d 597 (4th Cir. 1997) .. 19, 20, 21

Buckley v Consolidated Edison Co., 127 F.3d 270 (2nd Cir. 1997) 4

Burch v Coca-Cola Co., 119 F.3d 305, 316 n.9 (5th Cir. 1997) 4

Gamble v City of Escondido, 104 F.3d 300 (9th Cir. 1997) 20

Groome Resources v Parish of Jefferson, 234 F.3d 192 (5th Cir. 2000) 20

Hemisphere Building Co. v Village of Richton, 171 F.3d 437 (7th Cir. 1999) 21

Jackson v City of Auburn, 41 F.Supp.2d 1300 (M.D. Ala. 1999) 21

Johnson v St. Clare's Hospital & Health Center, 1998 WL 236235, *7-8 (SDNY 1998), *aff'd* 175 F.3d 1008 (2nd Cir. 1999) 4

Page

Keys v City of Olathe, 75 F.Supp.2d 1235 (D.Kan. 1999), *rev'd in part on other grounds*, 248 F.3d 1267 (10th Cir. 2001) 23

LeBlanc-Sternberg v Fletcher, 67 F.3d 412 (2nd Cir. 1995) 19

Mountain Side Mobile Estates v HUD, 56 F.3d 1243 (10th Cir. 1995) 21

Oxford House v City of St. Louis, 77 F.3d 249 (8th Cir. 1996) 23

Roberts v New York State Dept. of Correctional Services, 63 F.Supp.2d 272 (WDNY 1999) 4

St. Mary's Honor Center v Hicks, 509 US 502 (1993) 27

Sutton v United Air Lines, 527 US 471 (1999) 3, 5, 6

Texas Dept. of Community Affairs v Burdine, 450 US 248 (1981) 22

Toyota Motor v Williams, 122 S.Ct. 681 (2002) 3, 8, 9, 10

White v Lee, 227 F.3d 1214 (9th Cir. 2000) 24

Federal Statutes:

28 U.S.C. §1254(1) 1

42 U.S.C.:
12102(2)(B) 8
3603(f)(9) 23

Page

Americans with Disabilities Act (ADA), 42 U.S.C. §12101, *et seq.* 1

Fair Housing Act (FHA), 42 U.S.C. §3601, *et seq.* 1

Rehabilitation Act, 29 U.S.C. §701, *et seq.* 1

Federal Regulations:

24 CFR Ch. V (4-1-95 Edition) 29

29 C.F.R.:
§1630.2(1) 3
§1630.2(j)(2)(ii)(iii) 8

New York Regulations:

14 NYCRR 375 6

NYCRR §375.8(c) 8

Other Authority:

New York General City Law, Article 3, Sections 27, 27-a, 27-b 23

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The District Court's opinion (Hon. Charles L. Brieant, USDJ) granting Petitioners' motion for summary judgment is unpublished and is annexed as Appendix A. The Second Circuit's original opinion (Hon. Robert Sack, USCJ), affirming in part and reversing in part, is published at 281 F.3d 333. The Second Circuit's final opinion is unpublished (2002 WL 449493 (2nd Cir.)) and is annexed as Appendix B.

STATEMENT OF JURISDICTION

The Second Circuit entered its final opinion on February 19, 2002. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF NOTIFICATIONS

As required by this Court's Rule 29(4), the Solicitor General of the United States and the United States Attorney for the Southern District of New York have each been served with 3 copies of this Petition for a Writ of Certiorari.

STATUTORY PROVISIONS INVOLVED

The provisions of the Fair Housing Act (FHA), 42 U.S.C. § 3601, *et seq.*, Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, *et seq.*, and the Rehabilitation Act, 29 U.S.C. § 701, *et seq.*, relevant to this Petition are annexed, respectively, as Appendices C, D and E.

STATEMENT OF THE CASE

In mid-1994, the Regional Economic Community Action Program (RECAP) sought special use permits from the Middletown Planning Board to operate service facilities on 2 contiguous parcels of land. On one parcel, owned by Richard Rowley, RECAP sought to operate a Head Start facility, together with day care services, various offices and a warehouse. On the other parcel, owned by the Formisano brothers, RECAP sought to construct and operate two residential facilities: a halfway house for recovering male alcoholics and a family support center for recovering female alcoholics with children.

After two public hearings, in September 1994, the Board unanimously granted a special use permit for the Rowley projects. After five public hearings, in December 1994, the Board, by a 4-2 vote, denied the special use permit for the Formisano facilities.

RECAP and the Government contend the Formisano decision violates the FHA, the ADA, and the Rehabilitation Act. RECAP also alleges that Middletown retaliated against RECAP for filing a January 1995 HUD complaint by reneging on a funding commitment of approximately $53,000 for a RECAP project at 208 North Street in Middletown.

Each of the above three Questions Presented has its own separate and distinct set of relevant facts. Therefore, in an effort to present with these questions with the "clarity" which is "essential to ready and adequate understanding" (Rule 14(4) of the Rules of the Supreme Court), each set of facts is contained in the specific Reason for Granting the Writ to which it is relevant.

REASONS FOR GRANTING THE WRIT

Point 1
The Recovering Alcoholics Who Would Have Resided at RECAP's Facilities Were Not "Disabled"

A. Determining Whether the "Impairment" of Alcoholism Constitutes a "Disability"

This Court has outlined a three-step process for determining whether an individual has a "disability" under the subject federal statutes: (1) whether she has a physical or mental impairment; (2) whether the activity allegedly limited by the impairment is a major life activity[1]; and (3) whether the impairment substantially limits that major life activity.[2] *Bragdon v Abbott*, 524 US 624, 630 (1998). "[T]hese terms need to be interpreted strictly to create a demanding standard for qualifying as disabled". *Toyota Motor v Williams*, 122 S.Ct. 681, 691 (2002)

Assuming that alcoholism is an "impairment" and thus passes the first step of the *Bragdon* inquiry, the question presented by this Petition is whether this impairment, as experienced by the "recovering alcoholic" who has already undergone treatment and who remains alcohol-free after at

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[1] "[T]he touchstone for determining" whether an activity is a "major life activity" is its "significance." *Bragdon*, 524 US at 638. "[S]ignificant" life activities are those that are "central to the life process itself", *Id.*, and include such functions as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(I).

[2] "[S]ubstantially limits" suggests "considerable" or "specified to a large degree". *Sutton v United Air Lines*, 527 US 471, 491 (1999)

least 30 continuous days of abstinence, can qualify as "disabled" under either the second or third step.[3]

B. The Proposed RECAP Clients

According to Peter Quinlan, RECAP's former Director of Chemical Dependency Services, the recovering alcoholics who were to reside at RECAP's proposed facilities were "healthy and productive people." They would have "already been detoxed" by having gone through thirty days of treatment in an "intensive setting" just prior to admission, and they no longer would be drinking. The prospective RECAP residents "are functional people" and "often when they're in the program they go to work . . . [and to] college".

Quinlan explained that the RECAP clients "suffered from poverty by and large," and that part of the criteria for their admission was "whether or not they had a functional disability . . . [or] some other limitation other than their chemical dependency," such as a co-existing health problem (like being HIV positive or having poor vision), a housing problem, a "mental health" problem, or an "intellectual limitation," and perhaps another issue, such as "personal trauma from childhood or relationships." The fact that a client is a

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[3] *See, Buckley v Consolidated Edison Co.*, 127 F.3d 270, 273 (2nd Cir.1997) ("mere status of being a recovering alcoholic . . . does not, on its face, appear to amount to a [substantial limitation on a major life activity]."); *Burch v Coca-Cola Co.*, 119 F.3d 305, 316 n.9 (5th Cir.1997) (while alcoholism may "rise to the level of a disability" in some circumstances, it is insufficient for plaintiff to merely state that he is an alcoholic); *Roberts v New York State Dept. of Correctional Services*, 63 F.Supp.2d 272, 285 (WDNY 1999) (alcoholism "is not a disability *per se* under the ADA"); *Johnson v St. Clare's Hospital & Health Center*, 1998 WL 236235, *7-8 (SDNY 1998), *aff'd* 175 F.3d 1008 (2nd Cir. 1999) (recovering alcoholic failed to provide medical evidence suggesting that his alcoholism substantially interfered with a major life activity, and therefore failed to establish a prima facie case of discrimination under the ADA).

recovering alcoholic, "in and of itself" is *not* the reason that he would benefit from a stay in the halfway house.

Dr. Barry Hawkins, Orange County Director of Chemical Dependency Services, confirmed that "[t]he typical [RECAP] resident is a working person who has a job in the community" and is part of "the work force." According to Hawkins, the recovering alcoholic is not the type of alcoholic "you're most familiar with," the type you see "laying around the streets, or vomiting, or stumbling out of bars." Rather the RECAP resident would be "invisible," "someone who doesn't drink"and "doesn't act out," "a contributing member of society;" "there's absolutely no distinction between them and other citizens." "The typical resident is a working person who has a job in the community." Being a recovering alcoholic[4] is a *permanent* status which "has nothing to do with [the] ability to perform or not perform anything."[5]

C. "Substantial Limitation" versus "Mitigating Measure"

This Court has made it clear that individuals, such as RECAP's proposed residents, must not "be evaluated in their hypothetical uncorrected state." *Sutton*, 527 US at 482. The effects of "measures to correct for, or mitigate, a physical or

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[4] Hawkins used the term "recovered alcoholic" to refer to "that type of person who was eligible for admission to the men's halfway house that RECAP was proposing" as well as RECAP's proposed "family support center."

[5] Besides providing the clients with shelter and meals, the very function of the halfway house is to train the client in "independent living skills," such as how to apply for a job, to dress for a job interview, to shop, cook, clean house and get through life without drinking, thus belying any claim that the clients are "disabled" from performing them. The clients' needs for such training might not necessarily be attributed to their alcohol problem; "[i]t could have been a number of things" such as a lack of education, or perhaps that "[t]hey were abused physically or sexually."

mental impairment . . . must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act." *Sutton*, 527 US at 482. "A 'disability' exists only where an impairment 'substantially limits' a major life activity, not where it 'might,' 'could,' or 'would' be substantially limiting if mitigating measures were not taken." *Sutton*, 527 US at 482.

Any "substantial limitation" the RECAP client might have experienced as a result of her alcoholism would be either past experience (from before she entered the facility) or "potentially or hypothetically," *Sutton*, 527 US at 482, experienced (in the event she should fall off the wagon). Throughout a client's residence at the RECAP facilities her drinking impairment would not "presently", *Sutton*, 527 US at 482, constitute a substantial limitation on a life activity.

Since it was not Congress' intent "to bring under the [ADA's] protection all those whose uncorrected conditions amount to disabilities," *Sutton*, 527 US at 484, it could not have been Congress' intent to brand these non-drinking "recovering" alcoholics as permanently disabled. The structured environment provided to a recovering alcoholic who has just come out of treatment (but who, by RECAP's admission, is *not* thereby unable to be a "productive citizen") is nothing more than a "mitigating measure". The RECAP's clients' need for such an environment no more constitutes a disability than the myopic sisters' need for eyeglasses in *Sutton*.

D. "Impairment" as "Physical or Mental"

The Second Circuit erroneously reasoned that (1) under state regulation (14 NYCRR 375) all prospective RECAP clients must be "unable to abstain without continued care in a structured supportive setting," (2) the need of a supportive setting constitutes a "substantial limitation" on the ability to

live independently, a "major life activity," and therefore (3) the RECAP resident is "disabled" as a matter of law. This reasoning fails because it necessarily extends the definition of "impairment" beyond the mere "physical or mental," as limited by the express language of the disability statutes, to include any number of social and economic circumstances which, according to Quinlan and Hawkins, are taken into consideration when determining an individual's need for a temporary stay in a halfway house. While consideration of such circumstances may further the State's regulatory purposes, it has no role in determining whether an individual is "disabled" under the federal disability acts. The phrase "unable to abstain without continued care in a structured supportive setting" is simply too subjective, vague and malleable to serve as a sufficient criterion for determining whether an individual is "disabled".

If, for example, the Second Circuit's syllogistic reasoning were applied to a productive, competent government official who is also a recovering alcoholic in need of a "supportive setting" in order to stay sober, such individual would have to be deemed "disabled," even if such need is fulfilled by her stable home and loving family, rather than a halfway house. The same would be true for the prosperous executive whose "care in a supportive setting" consists of expensive weekly sessions with a private therapist and daily sessions with a personal trainer. What separates these hypothetical "recovering alcoholics" from their less fortunate counterparts who end up in RECAP-type halfway houses is socio-economic status, not the "physical" or "mental" impairment of alcoholism. Indeed, Quinlan and Hawkins were quite clear and explicit about this.

In other words, it is not recovering alcoholism, *per se*, which would qualify an individual for temporary residence in one of the proposed RECAP facilities. It is recovering alcoholism *plus* some other difficult life circumstance, such as poverty,

homelessness, illiteracy or some other impairment or illness. There is no indication that Congress intended such life circumstances to be considered in determining whether an individual meets the definition of "disabled".

E. The "Impairment-Substantial Limitation" Distinction

This Court in *Williams* held that in order to satisfy the "substantial limitation" requirement, "[t]he impairment's impact must . . . be *permanent or long-term.*" *Williams*, 122 S.Ct. at 691, *citing* 29 CFR §§ 1630.2(j)(2)(ii)-(iii) (emphasis added).

While the Second Circuit was correct in observing that under NYCRR § 375.8(c), "RECAP's clients qualify to live in a halfway house because they need its supportive environment," it is also true that "[u]nder New York law, a halfway house admits only those to be discharged 'between three and nine months after admission'". Thus, while the RECAP clients' "*impairment* is . . . long-term," as noted by the Second Circuit, the *impact* of that impairment is of relatively short duration. For reasons unstated, the Second Circuit has in effect held that since the impairment of alcoholism is of long (or permanent) duration, then so must be its substantially limiting "impact." There is no basis for such a holding in either law or this record.

The Second Circuit further obfuscates the "impairment/ substantial limitation" distinction when, citing 42 U.S.C. § 12102(2)(B), it concludes that "even if RECAP's clients did not meet the first definition of a disability, they would qualify under the second because they have a record of having *an* impairment." Under § 12102(2)(B), "[t]he term 'disability' means, with respect to an individual – (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual [or] (B) a record of *such* an impairment . . ." (emphasis added) It is therefore not enough that the RECAP clients have a record of alcoholism; they must

have a record of an alcoholism which resulted in a "permanent or long-term", substantial limitation of a major life activity.

F. The "Individualized Assessment" Requirement and Class-Type Actions

A determination as to whether an impairment "substantially limits" a "major life activity" must be made on a "case-by-case basis," *Albertsons, Inc. v Kirkingburg*, 527 US 555, 565 (1999), and "[i]t is insufficient for individuals attempting to prove disability status under this test to merely submit evidence of a medical diagnosis of an impairment." *Williams*, 122 S.Ct. at 691.

"An individualized assessment of the effect of an impairment is particularly necessary when the impairment is one whose symptoms vary widely from person to person." *Williams*, 122 S.Ct. at 692. As the instant record bears out, alcoholism is definitely an impairment with widely varying symptoms, particularly among "recovering alcoholics".

The "individualized assessment" requirement strongly suggests that any disability lawsuit brought on behalf of a generalized class of unknown persons whose impairment is not one that "invariably cause[s] a substantial limitation on a major life activity," *Albertsons*, 527 US at 566, might be a frivolous lawsuit. This is not to say, of course, that *all* disability class-type actions would be without merit. Some "physical or mental" impairments can be identified generally by the very limitations they cause. Being blind is *the same as* being substantially limited in the major life activity of seeing; being mentally retarded is *the same as* being substantially limited in cognitive reasoning. These impairments can certainly be the proper subjects of class-type disability claims, since it is obvious that they also constitute "disabilities".

But such is not the case with an impairment like alcoholism, a so-called permanent condition that might cause no limitation at all (other than the inability to drink alcohol in moderation). The purported "substantial limitation" upon the RECAP client's ability to live independently, which is identified by contextual, socio-economic, theory-dependent criteria, cannot possibly supplant the *Bragdon-Williams* "individualized inquiry" requirement.

Point 2
The Planning Board's Denial of the Special Use Permit Did Not Violate the FHA, ADA or Rehabilitation Act as a Matter of Law

Background

Middletown is a small city of approximately 4½ square miles, with a population just under 25,000. It enjoyed economic prosperity due in substantial part to its location at the intersection of 2 major railroad lines, the Erie Lackawanna and the Ontario & Western. Like many small northeastern cities, Middletown saw its fortunes decline in the 1970/80's when nearby shopping malls decimated its downtown core, leaving a shell of vacant buildings. The Erie stopped service in the late 1970's-early 1980's, and by 1994 was a dead track. That left the O&W line as Middletown's last active rail line, although by 1994 the historic O&W Station was no longer being used as a train station, and traffic along the line was minimal.

Faced with an economic and financial crisis in the early 1990's,[6] Middletown began serious revitalization efforts

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[6] This crisis involved double-digit increases in property taxes, layoffs from City government for the first time in a century, a half-million fund balance deficit that threatened Middletown with loss of its bond rating and bank-

(continued...)

involving the reinvigoration and emplacement of commercial and industrial enterprises along the O&W line.[7] Middletown actively sought the construction of the world's first commercial waste-to-ethanol plant (the Masada project) on the southern end of that line. If the 100 million-plus plant is built, rail traffic along that line might substantially increase.[8] By 1994 (and until today, in fact), there existed practically no available, industrially-zoned land in Middletown, save for the O&W corridor.

The Middletown Zoning Ordinance

The O&W corridor is comprised mostly of industrial districts, although there are residential districts that abut the line in the older sections of Middletown. Due to cumulative zoning and the early 20th century practice of locating homes near rail lines, the industrial districts in the O&W corridor contain some residential dwellings: single-,two-,and multi-family; most are early 20th century vintage. With one exception,

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[6](...continued)
ruptcy, high unemployment, an exodus of families, increased foreclosures, abandoned buildings, and double digit increases in crimes.

[7] Many of these new enterprises received loans from Middletown's Office of Economic and Community Development including the heavy commercial/light industrial uses now occupying the former Formisano and Rowley premises. The record is clear that *after* 1994, a number of commercial and industrial users chose to locate along the O&W line, *including the Rowley and Formisano parcels*.

[8] The O&W line comes to a dead end a few miles south of the City limits; hence all rail traffic generated by commercial or industrial users in the southern end of Middletown will pass directly by the Rowley and Formisano properties.

there has been no new residential construction in the industrial districts of the O&W corridor since 1980.[9]

The Zoning Ordinance makes no distinction between residential uses that house the disabled or any special needs population and residential uses which do not house the disabled or needy. The Ordinance contains districts for multi-family dwellings and residential complexes, comprising about 25% to 35% of the City.

In the 1990's either the City or the Planning Board rejected *every* proposal for residential complexes in the industrial districts along the O&W line: in 1992, the Planning Board opposed a proposal for a senior citizens complex in the southern part of the corridor,[10] the City informally rejected a proposal for senior citizen housing in the O&W Station,[11] and the City in 1991 rejected a RECAP proposal to place a halfway house for recovering alcoholics in the O&W Station.

The 1994 Planning Board Hearings

In the spring of 1994, RECAP approached City officials with the proposed Head Start and alcohol residential facilities; Middletown Mayor Joseph DeStefano advised Bill Cummings, President of the RECAP Board of Directors, that he would oppose the location of the residential facilities on the

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[9] The one exception is a residential complex in the corridor's northern end which the Planning Board approved in 1987 over opposition from the City; the Planning Board has not allowed *any* premises in the *entire* corridor (*all* zoning districts) to be *converted* from non-residential to residential use since 1980.

[10] If that residential complex had been built, it is unlikely that the Masada project would be tenable today.

[11] The O&W Station is contiguous to the Formisano property.

Formisano property (again, next door to the similar RECAP proposal at the O&W Station that DeStefano opposed 3 years earlier), and suggested RECAP find an alternative site for those facilities.[12] The Planning Board began to consider the applications for the Rowley and Formisano projects on August 18, 1994.

The first Middletown official to speak was Alderman Dan Long, who expressed caution regarding the Rowley project because of Middletown's wish to maintain the area for commercial and industrial uses. DeStefano indicated that he shared Long's concern for the planning aspects, "especially along our railroad"; because the Head Start and related projects were "non-residential" and "program oriented", he supported the Rowley project.

DeStefano opposed the Formisano project, stating he had supported recent RECAP housing projects, involving some recovering alcoholics and substance abusers, and the proposal was a "good project", but concluded: "we are just trying to put an end to the perception that the only type of development that can go on in Middletown is human service development."

In the September Hearing, DeStefano argued the Formisano facilities, unlike the Rowley facilities, did not contribute to the "orderly development" of that area, and would "infringe upon future . . . light industrial and commercial development in and around that corridor."

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[12] RECAP Executive Director Charles Darden admitted that prior to December 1, 1994, RECAP never advised or suggested to the Planning Board or any City official any alternative sites for the alcohol residential facilities.

RECAP Executive Director Darden stated that the project was "isolated, the fact that there's very few residential bodies in this area. Most of it is primarily commercial."[13]

At the October Hearing, Alderman Long stated:

> And we have a real active rail line that goes through the City. And not a whole lot of old municipalities have that. So we don't have a highway out there. That we can put a mall on. But we do have a railroad . . .
>
> All the parcels in question tonight are on an active rail line. It's the only active rail line left in the City . . . I have a question about a residential facility along the active rail line. And if you follow this line through our City you'll notice no high density developments immediately adjacent to the line.

After stating "[r]ail is an important ingredient in the economic development formula", Long stated, "So basically what we're

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[13] That the Second Circuit missed this crucial evidence is clear from its observation that the properties in the surrounding area were "not largely industrial". The Second Circuit ignored maps in the record showing that the Rowley and Formisano properties *are practically ringed by commercial uses.*

Middletown's planning expert, Stuart Turner, testified:

> I don't think it would be bad planning to locate industrial uses on that property . . . [b]ecause . . . that particular area is not predominantly residential and . . . again, the city's policy is reflected in the fact that they have zoned that for industrial use and anticipates over time that . . . those residential uses may or may not be there. . . . It is not intended to be a residential area and that is the reason it is zoned that way.

Turner also testified, "I wouldn't want to expand the residential development in this particular area. I don't think it is an appropriate place for residential development. . . .There is a railroad around it that historically has been active and may be more active."

trying to do is . . . develop this corridor to help us go into the year 2000 so we can survive as a City."

DeStefano stated "the City is not looking to . . . pre[v]ent those with special needs from coming in. We are concerned with good orderly development." DeStefano referenced the only residential development in an industrial district on the O&W line, and argued this was "poor planning" by the prior planning board:

> That the corridor is; the City from the day of its inception, planned the rail lines for industrial and commercial development. We have had some mistakes. Let's not repeat the mistakes of the past . . .
>
> But the most significant issue facing the Board is the orderly development issue.
>
> The only active rail line in the City, a large commercial industrial parcel along that rail bed, the investment by the City and State to encourage economic development in that area, and to give an opportunity to the people who live in that area to have jobs . . .
>
> A properly planned development for this area will enhance our tax base . . .[14] [T]his community is dying for economic development. You're taking the last piece of economic development and making a major decision on the future course of this City . . .

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[14] DeStefano alluded to the proposed solid waste facility on the southern end as an example of proposed development of the railroad bed and also as an example of industrial development that could be thwarted by the RECAP residential proposal.

In the November Hearing, Neil Novesky, the City's Economic Development Director, referenced ongoing discussions regarding expanding a foreign free trade zone into Middletown:

> One of those zones to be considered is that strip, that rail strip coming from Wallkill all the way through. Everybody is aware of it, pas[t] the [Rowley] property, right into town.
>
> The point is that it's probably not in the best interest of the City's economic development strategy to locate a facility on – a residential facility particularly on a rail line which is potentially the only viable development zone left in the City . . . This is not a voice in opposition to the concept of a residential alcohol rehabilitation facility, or anything of that nature. I would say that it's simply in opposition to the specific site, which is on a rail line, and it's got potential economic development use which cannot be overstated.[15]

Planning Board Chairman Seth Arluck discussed the potential of idling trains at the O&W Station adjacent to the Formisano property[16], noted he had "been around all kinds of rail switching areas for years . . . and the vibration and so forth

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[15] When asked if the Formisano property was too small for industrial use, Novesky gave an example of a small business Middletown had assisted, and stated that "5,000 square feet could be a significant area of space depending on the company."

[16] Arluck emphasized "the old O & W station are the last places where there is any room to put an extra line in."

from diesel engines is tremendous being that close"[17], and stated:

> At one time people built residences right up to the track. In that area many of those people probably worked in the train yards. Nobody really gave it a second thought, but I think now we take a little closer look at what kind of nuisances will exist for residential purposes, and it's significant . . .
>
> I found it to be a nuisance and was sorry I had bought a house so close to – even a couple of blocks from a train track. Now if I was living right next to it . . . I think that it's a real issue . . . I don't think the speed of the train is the issue. . . the worse thing it can do is when . . . it's moving more slowly, it is more of a nuisance.[18]

At the December Hearing, Arluck noted that the Planning Board had previously rejected a 1992 application for senior housing in the O&W corridor.[19] Arluck concluded:

> I am on record . . . as opposing non-industrial development in an industrial zone . . .
>
> So my recommendation to this Board is to deny this application for that reason because it is in an

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[17] Arluck emphasized the Formisano property "is very close to the track".

[18] Novesky cited his experience on the Metropolitan Transit Authority with the issue of trains with diesel engines idling near residential facilities, and indicated this could be a potential problem if a residential facility was placed on the O&W line.

[19] Arluck noted the previously approved Head Start and related uses were not residential, and "[t]here is no one sleeping there at night".

> industrial zone, and I am concerned about the use of the ability of other people, of other industrial users in this area. I'm concerned about train traffic next to a residential facility. . . . I have – in the past, I have not supported this use in this zone.

Board Member Thomas Swierski, a former Councilman, stated:

> I believe that the City itself has extended itself and embraced significant other services that have come our way, and I have to say that for us to be the magnet for the area is not necessarily for the best industrial development of this or any other project.
>
> So I would say, Mr. Chairman, that I feel that the proper industrial development of this is more important in my vote, and I will vote no for this project.

Argument

Research has not disclosed an FHA lawsuit against a municipality (1) with Middletown's massive, recent and undisputed commitment to facilities and services supporting the poor and disabled,[20] (2) whose planning board had such powerful, traditional and undisputed zoning reasons to deny a permit for a residential facility on an active railroad line in the middle of that small municipality's last industrially

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[20] Darden testified that Middletown today has more *facility capacity* for the treatment of homeless people and recovering alcohol and substance abusers than any other municipality in Orange County; in 1994, Middletown's facility capacity in this respect would have been a "toss up" with the City of Newburgh. Darden could not name any city the size of Middletown *anywhere* with as much facility capacity *today* to treat the homeless and recovering alcohol and substance abusers.

developable area, and (3) whose very existence was threatened by an unprecedented and undisputed economic and financial crisis.

The divisive issue concerning the respective obligations of urban and suburban/rural governments for housing and caring for special needs populations is one of the most important social issues facing America today. Because the discussion of this issue at the Planning Board hearings forms the primary basis of the Second Circuit's holding, a message has been sent that volunteer planning board members cannot discuss this important issue without fearing monetary damages from disgruntled applicants and incurring the wrath of Justice Department censors. The Second Circuit has instructed municipal boards to play it safe and silence speakers on this controversial issue.

Petitioners do not concede the District Court finding of a prima facie case, but for the sake of brevity, these arguments will be presented primarily in the section regarding pretext. The compelling justification for the Planning Board's action is intertwined with the District Court's determination that no material issue of fact warrants presentation of the pretext issue to a jury.

A. The Disparate Treatment Prima Facie Case

Second and Fourth Circuit holdings require Respondents to provide evidence from which a factfinder could reasonably infer that the Planning Board's vote was *significantly* motivated by factors related to the disabled status of the residents of the prospective RECAP facilities.[21] Even if this Court rejects the

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[21] *See, LeBlanc-Sternberg v Fletcher*, 67 F.3d 412, 425 (2nd Cir. 1995); *Bryant Woods v Howard County*, 911 F.Supp. 918, 929 (D.Md. 1996), *aff'd* 124 F.3d 597 (continued...)

Ninth Circuit's *Gamble* formulation, the "significant motivation" test cannot be met at bar.[22]

B. Legitimate Justification

> [T]he FHA does not provide a blanket waiver of all facially neutral zoning policies and rules, regardless of the facts . . . which would give the disabled carte blanche to determine where and how they would live regardless of zoning ordinances to the contrary . . .

Bryant Woods, 124 F.3d at 603; *Groome Resources v Parish of Jefferson*, 234 F.3d 192, 216 (5th Cir. 2000) (federal govt. cannot

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[21](...continued)
(4th Cir. 1997)

Under the Ninth Circuit's formulation, Respondents cannot establish a prima facie case because they cannot show that Middletown has granted anyone else a special use permit to construct a residential facility in the industrial districts of the O&W corridor in the 1990's. *See, Gamble v City of Escondido*, 104 F.3d 300, 305 (9th Cir. 1997) where the necessary elements of a prima facie claim to survive summary judgment in an FHA zoning case were articulated:

> (1) plaintiff is a member of a protected class; (2) plaintiff applied for a conditional use permit and was qualified to receive it; (3) the conditional use permit was denied despite plaintiff being qualified; and (4) defendant approved a conditional use permit for a similarly situated party during a period relatively near the time plaintiff was denied its conditional use permit.

[22] For example, in *Bryant Woods*, a developer was denied a permit from a planning board to expand a group home for the disabled. Citing legitimate concerns regarding parking congestion and the fact that there were other similar facilities located in the municipality, the Fourth Circuit upheld the district court's grant of summary judgment on FHA claims. The district court rejected the developer's contentions that the planning board took community pressure into account, was motivated by discriminatory animus, and offered shifting and irrational justifications for its decision; it was "clear from the record that the Planning Board considered legitimate land use criteria in arriving at its decision." 911 F.Supp. at 930.

through FHA "regulate the intricacies of local zoning decisions")

Municipalities offering less important justifications than Middletown have satisfied this burden *as a matter of law. See, Mountain Side Mobile Estates v HUD*, 56 F.3d 1243 (10th Cir. 1995) (municipality's justifications – sewer system limitations, quality of life in mobile home park – overcame prima facie case of FHA discrimination resulting from municipal occupancy limitation on families); *Brandt v Village of Chebanse*, 82 F.3d 172 (7th Cir. 1996) (village did not discriminate against plaintiff who sought to build home for the handicapped in light of legitimate concerns regarding flooding and lack of sanitary and storm sewers); *Jackson v City of Auburn*, 41 F.Supp.2d 1300 (M.D.Ala. 1999) (rejection of apartment complex for black tenants in white single-family neighborhood survived FHA challenge because plaintiffs could not show that any permits had been granted to similarly situated applicants and because city had legitimate justification that a duplex development would not be compatible with single-family subdivisions).

The Second Circuit's opinion ignores the well established zoning precept that a permit for one residential facility will create a precedent for more. "[D]iscrete zoning decisions influence future decisionmaking through their precedential value within the administrative and judicial systems." *Bryant Woods*, 911 F.Supp. at 942; *Hemisphere Building Co. v Village of Richton*, 171 F.3d 437, 439 (7th Cir. 1999) (in a fair housing challenge, a standard argument against piecemeal rezoning or granting of special use permits "is that by allowing the character of a neighborhood to change, it paves the way for further requests for rezoning [or special use permitting], until the land-use plan that generated the zoning is completely eroded . . . A municipality can if it wants try to retard the erosion of its land-use plans by being chintzy about permitting departures from its existing zoning.") How would the

Middletown Planning Board turn down the next residential proposal in that rail corridor, e.g., a senior citizen complex two blocks away, or garden apartments a mile away, etc.? There is no evidence in the record disputing the domino effect of emplacing a residential facility on the Formisano property – the eradication of an industrial zone.[23]

C. Pretext

When the burden shifts back, a plaintiff must raise a genuine factual question whether the defendant's proffered reasons are pretextual "either directly by persuading the court that a discriminatory reason more likely motivated the [defendant] or indirectly by showing that the [defendant's] proffered explanation is unworthy of credence." *Texas Dept. of Community Affairs v Burdine*, 450 US 248, 255-256 (1981).

The Second Circuit held that Respondents deserve a trial on pretext for 2 reasons: (1) various statements made by DeStefano, other City officials, and Planning Board members, and (2) allegedly different treatment by the Planning Board of the Rowley project.

1. The Statements

1-a. The Debate Between the Mayor and RECAP Officials

The Second Circuit uses the debate during the hearings between DeStefano and RECAP regarding whether there was a need for the Formisano facilities in Middletown to taint the Board vote. But this debate dovetails into FHA disparate treatment and disparate impact balancing tests because the actual need *has been a question*: there never has been a family

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[23] Thus the Second Circuit's concern regarding the size of the Formisano parcel is irrelevant.

support center in Orange County, and Darden admitted that this need has been met by scattered site housing. Darden admitted that with the expansion of a Newburgh halfway house, he was not sure if there is a need for another halfway house in Orange County. *See, Oxford House v City of St. Louis*, 77 F.3d 249, 253 (8th Cir. 1996) (FHA does not "insulate [the disabled] from legitimate inquiries designed to enable local authorities to make informed decisions on zoning issues.")

Apart from isolated comments, Board members did not participate in this debate, and it is clear from the record that all of their votes were based on sound planning concerns. DeStefano was not a member of the Board, nor did he have any authority or supervisory power over it.[24]

1-b. Isolated Comments

The Second Circuit identifies a couple isolated comments out of five hearings (hundreds of transcript pages): 1 comment each from Arluck, Miner, and Board counsel Alex Smith.[25]

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[24] Although the Planning Board is a City agency, it is an entity charged with duties under State law and its decisions involving special use permits are governed by State law. New York General City Law, Article 3, Sections 27, 27-a, 27-b.

[25] The Second Circuit suggests discriminatory bias on Smith's part because he asked RECAP officials to place on the record their reasons for their conclusory assertions that the facilities were needed in Middletown. A *duty* of municipal attorneys is to ensure that a full record is made before municipal boards, something that Smith often did during the hearings – and often on issues that inured to *RECAP*'s benefit.
The Second Circuit criticizes Smith for questioning whether residents of the RECAP facilities would have criminal histories. But the FHA specifically allows this inquiry. 42 USC 3604(f)(9); *Keys v City of Olathe*, 75 F.Supp.2d 1235 (D.Kan.1999), *rev'd in part on other grounds*, 248 F.3d 1267 (10th Cir.2001)

Upon examination, these comments were questions directed at RECAP's refrain that the Formisano facilities were needed in Middletown,[26] and have been judicially recognized both as protected speech and legitimate inquiry. The specter, however, of the Second Circuit's holding is Justice Department censorship of speech at municipal planning and zoning hearings.[27]

1-c. The Novesky Comment

The Second Circuit finds pretext in a general comment by Novesky regarding the deterrent effect of "a certain type of social service or support service program", but fails to acknowledge that a couple of moments before, Novesky made clear that he was referring to "a *residential facility particularly on a rail line*".

1-d. Chairman Arluck's Summary

At the last hearing, Arluck summed up the reasons given *to* the Board to vote for or against the RECAP project. The Second Circuit make much of his last reason to deny:

> Another reason that was brought up proposing [sic] this by the Mayor and Council Members that there's an over-concentration of *residential* and

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[26] The Arluck comment is simply a non-judgmental observation that a debate had taken place.

[27] *Cf., White v Lee*, 227 F.3d 1214 (9th Cir. 2000) (Actions of HUD officials in conducting eight-month investigation into conduct of neighbors who opposed conversion of motel into multi-family housing unit, including questioning of neighbors and endorsing settlement by which investigation would be terminated if neighbors relinquished their constitutionally protected expressive activities, impermissibly chilled neighbors' First Amendment right to engage in expressive activity.)

> social service facilities in the City, which tends to put a demand on City services, while at the same time eroding the tax base. (emphasis supplied)

The Second Circuit states that Arluck was urging the Board to get into the overconcentration debate and utilize this issue as a reason to deny, but ignores two critical points:

First, the record reflects that Arluck was simply summarizing for the Board arguments that had been made pro and con *to* it. Arluck did not attempt to critique or legitimize these pro and con arguments and did not take a position until he provided *his* reasons to deny the project.

Second, the word "residential" was highlighted in the above quote because it implicates 2 flaws that permeate the Second Circuit's opinion: (1) the term "overconcentration" necessarily implies an FHA violation, and (2) its disregard of the fact that the Formisano facilities were in an *industrial* district. A planning board exists to control and guide municipal growth, and in so doing must *balance* residential and industrial growth. There is nothing wrong with a planning board preventing the overconcentration of *residential* facilities – whether single family homes, senior citizen complexes, or facilities for the disabled – in *industrial* districts.

1-e. The Swierski Statement

Contrary to the inference made by the court below, any fair reading of Swierski's statement indicates clearly that he voted to preserve what he termed this "important" industrial corridor, and that although RECAP's project had value, it was *outweighed* by the need for industrial development. *Balancing* a project for the disabled against industrial and commercial development in an *industrial* zone does not violate the FHA if the scale tips toward development.

1-f. Miner's Comments

The Second Circuit distorts Miner's mention in his deposition that he had a "concern" regarding the over-concentration issue during the hearings into making it "one of his bases for opposing the permit".[28] Miner made clear, however, his belief that the overconcentration issue *did not have to be decided* in this case, and there is no evidence it formed a "base" of his vote.

2. Differential Treatment

The Second Circuit reasoned that pretext can be inferred because the Board approved the Rowley project. The court below viewed this as different treatment of similarly situated groups because the Head Start project was a non-industrial use and because the children coming to that facility would have suffered from the same potential nuisance from the rail line as would the residents on the contiguous Formisano property.

First, the children would *not* have been exposed to the same potential nuisance because they would be there only limited hours of the day, and more importantly, would have been located in a portion of the larger Rowley property on the *North Street* side that *was significantly further away* from the rail line than the Formisano facilities which were right next to the

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[28] The Second Circuit ignores Miner's emphatic deposition testimony that his primary concerns were "applying planning considerations as to whether to approve [the RECAP project] for a particular site wherein economic development concerns had already been identified" and the "future implications of such a permit on the future direction of economic and industrial and commercial growth within the city."

tracks.[29] And the RECAP warehouse building would have further separated the children's area from the tracks.

Second, the Head Start, the day care center and its related offices was a *non-residential*, commercial enterprise that would have *complemented* nearby commercial and industrial uses because the labor force would have a facility to care for younger children.[30]

"[A] reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was *false*, and that discrimination was the real reason". *St. Mary's Honor Center v Hicks*, 509 US 502, 515 (1993)(emphasis supplied) Neither Respondents nor the Second Circuit provide any issue of material fact warranting a trial on the *falsity* of the Planning Board's obviously legitimate reasons to deny the Formisano application.

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[29] The record reflects that the Formisano facility would have been less than 50 feet from the tracks. As Arluck put it, "when I drove down there and saw Formisano's property and I could reach out and touch that railroad line, and said, why should somebody – just because they are a substance abuser . . . why should they have to be next to a railroad?"

[30] The Second Circuit overlooks that the Head Start project was to be accompanied by an infant day care center and that – even assuming the notion that day care complements nearby commerce/industry requires explication – the record reflects that comments were made to the Planning Board that low income working parents needed such services, and that the Rowley project would thus be a positive step toward attracting industrial-based jobs to Middletown. Arluck made it clear *during the hearings* that the significant difference between the two projects was the "non-residential" nature of the Rowley uses.

Point 3
The Retaliation Claim Was Correctly Dismissed as a Matter of Law

As Chairman of the Planning Board, just prior to his election as Mayor, and over political opposition, DeStefano supported RECAP's application for a residential facility for homeless men, some of whom had alcohol and substance abuse recovery issues, at 208 North Street.

By letter dated June 23, 1993, the Middletown Community and Economic Development Office provided a preliminary loan commitment in the amount of $53,139 for the purchase of furnishings by RECAP at 208 North Street. RECAP did not seek to draw down any funds from this loan until a letter dated December 8, 1994. By that time, the 1993 loan monies in the Community Development Office had been *obligated*; nevertheless, the Office began to review the RECAP request, and asked in writing that RECAP submit required documentation for a Rental Rehabilitation loan; RECAP *never* submitted this documentation.

In early 1995, the Office began to receive complaints that RECAP was using contractors which had previously been disapproved by the Office for utilizing unlicensed workers and for the poor quality of their work. In March 1995, the Office received its *first* request from RECAP for a specific dollar amount for 208 North Street.

The District Court correctly held that no material issue of fact exists as to the motivation behind Middletown's refusal to provide the loan for 208 North Street. The City rejected RECAP's request because RECAP never submitted the required application, the funds that were initially targeted in 1993 were spent on other deserving projects for low income persons, and, most importantly, because RECAP insisted on using a banned

contractor in the renovation work done at 208 North Street. In its Rule 56.1 statement submitted to the District Court, RECAP did not deny that it used a banned contractor.[31]

Given the use of a banned contractor, approval of the RECAP loan would have violated HUD regulation §570.609 which is entitled, "Use of debarred, suspended or ineligible contractors or subrecipients":

> Assistance under this part shall not be used directly or indirectly to employ, award contracts to, or otherwise engage the services of, or fund any contractor or subrecipient during any period of debarment, suspension, or placement in ineligibility status under the provisions of 24 CFR part 24.[32]

The Second Circuit also erred in its "protected activity" analysis. According to its Complaint, RECAP's retaliation cause of action is based *solely* upon Middletown's alleged desire to retaliate for RECAP's filing of a complaint with HUD in January 1995 attacking the Formisano decision. The Second Circuit allowed RECAP to, in effect, amend its Complaint by adding a new "protected activity": a letter sent by RECAP's attorneys to the City and Planning Board on December 5, 1994, five days after the Formisano decision. The letter demanded that the decision be "rescinded"; it was faxed to City Hall and threatened "legal action" "if we do not hear from you by the end of the business day tomorrow". But the Second Circuit ignores that on the evening of December 5, 1994, the RECAP Board of Directors met and voted *not to authorize legal action*

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[31] Nor did RECAP provide any admissible evidence that it ever submitted an application.

[32] 24 CFR Ch. V (4-1-95 Edition)

against Middletown. Darden admitted there was no authority to send the December 5th letter after the Board's vote. Board members Richard Baum and Richard Roberts, who were then Orange County Legislators, advised DeStefano that neither the letter nor legal action was authorized, and that the City should disregard same. RECAP cannot assert that the sending of an unauthorized letter – with an hours-later instruction from its Board of Directors to disregard it -- constitutes "protected activity". The District Court correctly held that one cannot retaliate against a nullity.[33]

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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[33] Thus the Second Circuit's reliance upon an alleged threat made during a mid-December telephone call is misplaced because the conversation took place *before* any protected activity had occurred.

APPENDIX

Appendix A—Opinion of Hon. Charles L. Brieant, USDJ, dated September 25, 2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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REGIONAL ECONOMIC COMMUNITY ACTION PROGRAM, INC.,

Plaintiff,

97 Civ. 8808 (CLB)

-against-

MEMORANDUM & ORDER

CITY OF MIDDLETOWN, CITY OF MIDDLETOWN PLANNING BOARD and JOSEPH DeStefano

Defendants.

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UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

-against-

CITY OF MIDDLETOWN,

Defendant.

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Brieant, J.

By motion filed February 4, 2000, heard and fully submitted on April 19, 2000, the City of Middletown ("City" or "Middletown"), City of Middletown Planning Board ("Planning Board") and Joseph DeStefano, defendants in this civil rights action for violation of the Fair Housing Amendments Act, 42

U.S.C. §3601, *et seq.* ("FHA"), the Americans with Disabilities Act, 42 U.S.C. §12101, *et seq.* ("ADA"), Section 504 of the Rehabilitation Act of 1993, 29 U.S.C. §794, and retaliation, move for summary judgment pursuant to Rule 56, Fed. R. Civ. P. Plaintiff Regional Economic Community Action Program, Inc. ("RECAP" or "Plaintiff") and Plaintiff-Intervenor the United States of America (collectively "Plaintiffs") filed opposition papers on April 4, 2000. Defendants filed reply papers on April 17, 2000. Plaintiffs filed surreply papers on April 26, 2000. Plaintiffs seek money damages as well as equitable relief in the form of declaratory judgments and injunctive relief.

Background

While Plaintiffs allege claims for violations of the FHA, ADA, and the Rehabilitation Act, and Plaintiff RECAP alleges a claim of retaliation, this case is, at its heart, no more than a land use dispute concerning the proper exercise of a municipality's authority to administer and enforce its local zoning regulations.

Plaintiff RECAP is a not-for-profit corporation established in 1965, for the provision of education, housing, social services and other programs to low income individuals in Orange County, New York. Defendant Middletown is an incorporated municipality in Orange County, New York. Defendant Planning Board is a voluntary board whose members are appointed by the Mayor of Middletown subject to confirmation by Middletown's Common Council. Smith Aff. ¶3. Defendant Joseph DeStefano is the Mayor of Middletown.

In 1994, RECAP sought Special Use Permits from the Planning Board to establish facilities on two contiguous parcels of land in Middletown which it planned to lease with the option to purchase from two private owners. On one parcel,

RECAP sought permission to operate a Head Start facility,[1] together with day care services, administrative offices and a storage facility (the "Rowley Property").[2] On the other parcel (the "Formisano Property"), RECAP sought permission to construct and operate a supportive residence to assist women recovering from alcoholism and their children (the "Family Support Community") as well as a second supportive residence to assist men recovering from alcoholism (the "Men's Community Residence") (collectively the "Proposed Residences").[3]

Both properties are located along the former Ontario & Western rail line corridor (the "O&W"), the last active rail line in Middletown. While the track of the former O&W line was still in use by Conrail for freight only in 1994, the O&W station was not being used as a train station and the traffic along the

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[1] Head Start is a comprehensive federal child development program which serves children, pregnant women and their families. It is a child-focused program and has the overall goal of improving the school readiness of young children in low-income families. The Head Start program is administered by the Head Start Bureau, the Administration on Children, Youth and Families, Administration for Children and Families, Department of Health and Human Services. *See* <http://www2.acf.dhhs.gov/programs/hsb/about/ mission .htm> (last visited September 19, 2000).

[2] The Rowley Property is 2.5 acres, located across the street from RECAP's existing building and runs to the former Ontario & Western railroad, where a rail spur on the property connects it to the track. RECAP planned to reconfigure existing buildings on the Rowley Property and construct new ones to accommodate a 10,000 square foot space for Head Start classes, day care for infants and additional rental space.

[3] The Formisano Property is one half acre situated across the street from RECAP's existing building and also borders the railroad track. On this property, RECAP planned to convert an existing building into a halfway house for 24 men recovering from alcoholism, and construct a new building, partly on the Formisano Property and partly on the Rowley Property, to house 20 recovering alcoholic mothers and their children.

line was minimal. Fusco Aff. at ¶3. The majority of industrial or potentially industrial plots available in Middletown are located along the O&W corridor. Fusco Aff. at ¶5-6, Ex. O. The rail track was useful only for abutting industrial users and without more such users it faced abandonment. The O&W line ends south of the City limits, so that there would be no rail freight traffic south of the City line.[4] Fusco Aff. at ¶7.

Under the applicable Middletown Zoning Ordinance in effect in 1994 (the "Zoning Ordinance"), all zoning districts in Middletown in which the uses proposed by RECAP were permitted required a Special Use Permit from the Planning Board.[5] *Id.* ¶11. The Zoning Ordinance also provided for districts for multi-family dwellings or apartment house complexes that make up 25-35% of the City and which also require Planning Board approval. In the 1990s, either the City or the Planning Board rejected every proposal for large residential complexes in the industrial districts along the O & W corridor. These proposals included one for a senior citizens complex in the southern part of the corridor, which was rejected by the Planning Board, and two proposals for housing

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[4] At the relevant times, Middletown actively sought the construction of a commercial waste-to-ethanol plant (the "Masada" project) on the southern end of the O&W line. Such a plant would result in a substantial increase in the traffic along the rail line. The availability of the O&W line was a factor in attempting to attract the Masada project. Fusco Aff.

[5] The ordinance in effect in 1994 also provided for "cumulative zoning," which allowed, for example, single and two family residences in commercial and industrial districts, and commercial uses in industrial districts as of right. Fusco Aff. at ¶9. "Cumulative zoning" has been largely discontinued in Middletown and elsewhere. Fusco Aff. at ¶9. With one exception, there has been no new residential construction in either the residential or the industrial districts of the O&W corridor since 1980. Fusco Aff.

in the former O & W Station, both of which were informally rejected by the City.[6]

On August 18, 1994, the Planning Board held a first public hearing and began considering RECAP's applications for Special Use Permits for the Rowley and Formisano Properties (the "Properties"). The Planning Board held two public hearings concerning both of the Properties, and three additional public hearings solely concerning the Formisano Property. RECAP told the board that RECAP preferred "an overall approach" but it was possible that RECAP could make the Children's Center project work without the Formisano property.[7] Ex. H to Smith Aff 153-154. Chairman Seth Arluck informed RECAP that the Planning Board would consider the Rowley and Formisano projects separately.

On September 19, 1994, after a second hearing, the Planning Board unanimously approved the Rowley project, subject to RECAP obtaining a negative State Environmental Quality Review Act ("SEQRA") declaration and agreeing to payment of property taxes or a payment in lieu of taxes. The Formisano project was also discussed at this hearing.

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[6] The Planning Board did approve of two residential dwellings in 1991, and a senior citizen complex in 1999, all in the south-eastern portion of the O&W corridor. DeStefano Aff. ¶2. These developments were within high density residential districts. *Id.* In the 1990s, the Planning Board also approved the rezoning of two industrial districts into residential districts; however, neither of these were within the O&W corridor. DeStefano Aff. at ¶5. In 1990, the Planning Board approved the rezoning of a single parcel in the O&W corridor from industrial to residential use. A church and a cemetery separated this parcel from the rail line. *Id.* at ¶4.

[7] The Complaint alleges, however, that the Children's Center was "doomed" without the Formisano Property. Complaint ¶62. No evidence in the record supports this contention.

On December 1, 1994, at the final hearing of the Planning Board on the Formisano Property, Chairman Arluck summarized the arguments which had been presented for and against the application during the course of the various hearings. Dec. Tr. at p. 44-45. Chairman Arluck stated that he "oppos[ed] non-industrial development in an industrial zone" and that he was "concerned about the use ... of other industrial users in this area." He further stated that he was "concerned about train traffic next to a residential facility." Dec. Tr. at 50-51. Other considerations discussed by persons in attendance at the hearings on the Formisano Property included: concerns about having a residential facility along the only active rail line in the city (Oct. Tr. at 32-34); the number of licensed residential care facilities already existing in the community (Oct. Tr. at 36-38); risks inherent in locating a residential facility in a rail corridor including concerns about idling engines and rail line traffic near residential facilities (Nov. Tr. at 67-68, 70-73, 93-96); and concerns about a traffic problem because of a dangerous intersection identified by the Commissioner of Public Works. In addition, concerns were expressed about the loss of potential economic development for industrial uses (Nov. Tr. at 62-64). Furthermore, the Planning Board received and noted favorable comments from members of the public who had benefitted from RECAP's programs in the past. Oct. Tr. at 16-30.

Ultimately, the Planning Board rejected only the Formisano application. It did so by a divided vote. The reasons expressed by the majority of the Planning Board were a desire to preserve the industrial rail corridor for industry and concern for the potential nuisance which an active rail line presents to residents. All members who voted against the project stated that they would have voted in favor of the project if it had been in another location in Middletown and that they would have opposed any residential use on the Formisano property. Arluck Aff., Swierski Aff., Moson Aff., and Miner Aff.

In the spring of 1995, Middletown offered to reconvene the Planning Board to address reasonable accommodations and possible alternative sites for the RECAP projects. Darden Dep. at 506-507. RECAP rejected the offer claiming it did so because at the time there was no funding available. Cummings Dep. at 51-52.

Commercial tenants now occupy both of the Properties. Mountain Restaurant Supply occupies the Formisano Property. Keck Industries, a manufacturer and finisher of furniture for houses of worship, and Best Mexican Foods, a food distributor, occupy the Rowley Property.

By letter dated December 5, 1994, RECAP informed Defendants for the first time that RECAP believed the denial of the Formisano Special Use Permit violated the FHA and the ADA. This letter was not authorized by the RECAP Board of Directors, and Defendants were informed thereafter that it should be disregarded. On December 22, 1994, Plaintiff and Defendants met in an attempt to resolve the dispute without litigation. On December 31, 1994, Plaintiff filed a complaint with the United States Department of Housing and Urban Development ("HUD") claiming that denial of the Formisano Special Use Permit constituted violations of the FHA, ADA and the Rehabilitation Act.

Claimed Retaliation

By letter dated December 8, 1994, Plaintiff requested funds from the Middletown Office of Community Development (the "Office") for furnishings for Plaintiff's 208 North Street facility[11] based upon a letter dated June 23, 1993 from the Office in

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[11] During the relevant time, RECAP operated a low income housing development at 208 North Street.

which the Office provided a "commitment" of funds.[12] By that time, the Office's 1993 funds had already been obligated. Despite these prior obligations, the Office reviewed RECAP's request and then requested in writing that RECAP submit the required documentation for a Rental Rehabilitation loan. RECAP did not submit this documentation.

In 1995, the Office began to receive complaints from local contractors that RECAP was not paying prevailing wage rates and that RECAP was using contractors who had been disapproved by the Office for utilizing unlicensed mechanics and for the poor quality of their work. The Office also began an inquiry into the financial and lien status of 208 North Avenue, and forwarded its file on RECAP, according to routine practice, to the Mayor's office for financial review. The Mayor returned the file and stated that in his judgment there were no financial concerns of any significance.

Plaintiff commenced this action on November 26, 1997, claiming that the City denied RECAP's application for the Special Use Permit for the Formisano Property because of the disabled status of the individuals who would reside on the property and did so in violation of the FHA, the ADA and the Rehabilitation Act. RECAP also claims that Defendants denied Plaintiff the 208 North Street funding in retaliation for the filing of a complaint with HUD. On June 17, 1998, the United States of America filed an intervenor Complaint and joined in RECAP's ADA, FHA and Rehabilitation Act claims.[13]

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[12] RECAP claims that this commitment was a grant, while Defendants argue that it was a preliminary loan commitment.

[13] The United States of America did not join in RECAP's retaliation claim and makes no claims against Mayor DeStefano as an individual.

Discussion

The standards for granting summary judgment in this Circuit are so well known as to obviate the need for citation. We note, however, that all facts must be viewed in the light most favorable to the non-moving party.

The New York legislature has empowered and urged the legislative authorities of municipalities in the state to establish Planning Boards to administer local ordinances, approve plats and act legislatively to ensure well-balanced land use in their jurisdiction. While municipalities do not have the inherent power to enact or enforce land use regulations, the legislature of New York has chosen as a matter of policy to delegate such zoning power to cities, villages and towns, through general enabling acts. *See* CLS Gen. City Law § 20(24), 20(25); CLS Vill. Law §§ 7-700 et seq.; CLS Town Law §§ 261 et seq. The General City Law of New York provides that

> subject to the constitution and general laws of this state, every city is empowered ... to regulate and limit the height, bulk and location of buildings hereafter erected, to regulate and determine the area of yards, courts and other open spaces, and to regulate the density of population in any given area, and for said purposes to divide the city into districts.
>
> Such regulations shall be uniform for each class of buildings throughout any district, but the regulations in one or more districts may differ from those in other districts. Such regulations shall be designed to secure safety from fire, flood and other dangers and to promote the public health and welfare, including, so far as conditions may permit, provision for adequate light, air, convenience of

> access ... and shall be made with reasonable regard to the character of buildings erected in each district, the value of land and the use to which it may be put, to the end that such regulations may promote the public health, safety and welfare and the most desirable use for which the land of each district may be adapted and may tend to conserve the value of buildings and enhance the value of land throughout the city.

N.Y. Gen. City Law § 20(24) (McKinney 2000).

The statute further provides the City with the power

> to regulate and restrict the location of buildings, designed for specified uses, and for said purposes to divide the city into districts and to prescribe for each such district the trades and industries that shall be excluded or subjected to special regulation and the uses for which buildings may not be erected or altered. Such regulations shall be designed to promote the public health, safety and general welfare and shall be made with reasonable consideration, among other things, to the character of the district, its peculiar suitability for particular uses, the conservation of property values and the direction of building development, in accord with a well considered plan.

N.Y. Gen. City Law § 20(25) (McKinney 2000).

Pursuant to such enabling statutes, city planning boards work to implement zoning ordinances which are established to provide for the development of a balanced, cohesive community which will make efficient use of the community's available land for the benefit of the entire community. Such

zoning ordinances and land use regulations divide the community into districts for the purpose of imposing reasonable land use regulations which will promote harmonious uses of the City's land and general public health, safety and welfare.

The Middletown zoning ordinance in effect in 1994 which the Middletown Planning Board was empowered to administer and implement stated that one of its primary purposes was to

> promote orderly development ... to protect the character and maintain the stability of residential, business and manufacturing areas within the city, and to promote the orderly and beneficial development of such areas.

MIDDLETOWN, N.Y., ZONING ORDINANCE, ch. 123-1(a), art. I.

In this case, the Planning Board was presented with two separate applications for Special Use Permits to establish residential uses in a specialized area of Middletown which was zoned for industrial use and where land use decisions were informed by the presence of the last rail line in the city. The denial of one of those two applications brought on this lawsuit. The municipal land use decision at issue in this case is being attacked not on principles by which zoning disputes are ordinarily resolved in this Court, but through statutes which do not relate directly to land use or zoning, that is the FHA, the ADA and the Rehabilitation Act.

The FHA makes it unlawful to "make unavailable or deny, a dwelling to any buyer or renter because of a handicap." *See* 42 U.S.C. §3604(f)(1). The ADA proscribes discrimination against persons with disabilities by public entities. *See* 42 U.S.C. §12132. The Rehabilitation Act prohibits recipients of federal funding from discriminating against persons with disabilities.

See U.S.C. §794(a). In challenging a zoning or land use decision such as the Planning Board's decision here, a Plaintiff may prevail under these statutes by establishing (1) intentional discrimination, (2) a disparate impact of a neutral law, or (3) a failure to make a reasonable accommodation. *See, e.g., Huntington Branch NAACP v. Town of Huntington*, 844 F.2d 926, 933 (2d Cir.), *aff'd*, 488 U.S. 15 (1988) (intentional discrimination and disparate impact under FHA); *Doe v. Pfrommer*, 148 F.3d 73, 82 (2d Cir. 1998) (intentional discrimination and disparate impact under ADA); *Sunrise Development, Inc. v. Town of Huntington*, 62 F.Supp.2d 762, 773-76 (E.D.N.Y. 1999). Plaintiffs' submissions do not bring their case within the foregoing bases for relief.[14]

Intentional Discrimination

Plaintiffs' claim that intentional discrimination was involved in the Planning Board's decision must be analyzed under a burden shifting analysis. *See Cabrera v. Jakabovitz*, 24 F.3d 372, 380-83 (2d Cir. 1994), *cert. denied*, 513 U.S. 876 (1994) (citing *McDonnell v. Douglas*, 411 U.S. 792 (1973)). Plaintiffs must establish a *prima facie* case that the challenged municipal zoning decision was discriminatory, at which point defendants may produce evidence of non-discriminatory, legitimate

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[14] The Court assumes for purposes of this motion that the prospective residents are "disabled" under the relevant statutes. *See Altman v. New York City Health & Hosps. Corp.*, 100 F.3d 1054, 1059 (2d Cir. 1996). Defendants argue that this determination constitutes a violation of the Establishment Clause of the United States Constitution because RECAP will be implementing an Alcoholics Anonymous ("AA") program at its residence, which invokes a Higher Being. *See Warner v. Orange County Dept. of Probation*, 173 F.3d 120 (2d Cir. 1999). The Court rejects this argument for such a determination does not require "judicial assessment of religious dogma" and therefore does not violate the Establishment Clause's prohibition against excessive governmental entanglement with religion. *See Gargano v. Diocese of Rockville Centre*, 80 F.3d 87, 89-90 (2d Cir. 1996).

reasons for the decision. *See id.* Once defendants have offered a legitimate basis for the decision, Plaintiffs must prove that the proffered reasons are pretextual in order to succeed. *See id.*

In order to establish a *prima facie* case of intentional discrimination under the FHA and the ADA, Plaintiffs need to allege that the disabled status of the population of the proposed residence was one significant motivating factor in Defendants' decision. *See Innovative Health Systems, Inc. v. City of White Plains*, 931 F.Supp. 222, 241 (S.D.N.Y. 1996), *aff'd*, 117 F.3d 37 (2d Cir. 1997); *see also Robinson v. 12 Lofts Realty, Inc*, 610 F.2d 1032, 1042-43 (2d Cir. 1979). In order to establish a claim under the Rehabilitation Act, however, Plaintiffs must show that the action was taken solely because of the disability. *See Flight v. Gloeckler*, 68 F.3d 61, 64 (2d Cir. 1995). In order to establish a *prima facie* claim under the Rehabilitation Act, Plaintiffs must show (1) they are "handicapped persons" under the Act; (2) they are "otherwise qualified" for the benefit that has been denied; (3) they are being denied benefits solely by reason of their disabilities; and (4) the entity denying plaintiff's benefits receives federal financial assistance. *Id.* at 63.

Plaintiffs rest their contention that a jury could find that the Planning Board's decision was based upon the prospective residents' alcoholism on public statements made by Mayor DeStefano and other officials during the Planning Board's hearings. During the course of the hearings, Mayor DeStefano argued, from the audience, against Plaintiff's proposal by discussing various matters related strictly to land use concerns, and also expressed concern regarding the total number of social service programs in the city. August TR. at 163-66; Sept. Trans. at 87-88. Other officials also commented on land use concerns, as well as about the concentration of social service facilities in Middletown. Sept. Trans. At 201-02, 205-06. The Court assumes for purposes of this motion that Plaintiffs have thereby established a *prima facie* case of intentional discrimination

under the FHA and ADA. As Plaintiffs cannot show that the decision was made solely for reasons of the proposed residents' disability, however, Plaintiffs have failed to establish a *prima facie* claim under the Rehabilitation Act. *See Flight*, 68 F.3d at 64.

Defendants have articulated legitimate, non-discriminatory reasons for their action. *See Soules v. United States Dep't of Hous. & Urban Dev.*, 967 F.2d 817, 822 (2d Cir. 1992). Defendants have provided evidence that good faith concerns about land use, including a need to preserve the industrial corridor of Middletown, as well as concerns about placing a residential facility along a rail line were the actual motivations for the Planning Board's decision. These reasons are legitimate and nondiscriminatory and are in furtherance of Middletown's valid zoning regulations. *See Forest City Daly Housing v. North Hempstead*, 175 F.3d 144, 152 (2d Cir. 1999). Defendants are not required to make special exception for disabled individuals if Defendants would deny the same permit for traditional residences. The Planning Board acted reasonably and within the scope of its authority to administer and enforce Middletown's zoning restrictions in the interest of the health, safety and welfare of the general public of their city.

Because Defendants have satisfied their burden, in order to succeed Plaintiffs must establish that the justifications asserted by Defendants are pretextual in order to succeed. *See Soules*, 967 F.2d at 822. Plaintiffs have failed to produce evidence that Defendants' justifications are pretextual. The fact that Defendants approved the Special Use Permit for the proposed use of the Rowley Property by RECAP is not inconsistent with their legitimate justifications for denying the Special Use Permit for the Formisano Property. The Head Start program to be conducted on the Rowley Property involves a non-residential facility operating only in daylight hours, which would provide support services that would facilitate desired industrial development. Turner Rept., Ex. R to Smith Aff. The

Head Start program could provide day care for the children of industrial workers, and its convenient availability near the places of employment of the parents is an amenity which could promote industrial growth by improving working conditions.

Plaintiffs also have failed to produce evidence that Defendants' desire to protect the prospective residents from the danger and nuisance of the rail line is pretextual. While the Head Start permit was approved despite a nuisance concern, the Head Start program is non-residential. The children participating in the Head Start program are not at the facility at night, so the noise and fumes of an active freight line would not disturb their sleep. Further, the head Start building would be further away from the tracks that the proposed residential buildings, with a storage warehouse existing between the head Start facility and the tracks. The children attending the Head Start program are not similarly situated to the proposed residents.

As Plaintiffs cannot show that Defendants' proffered reasons were pretextual, Plaintiffs cannot succeed on their intentional discrimination claims.

The Planning Board Approvals and Rezoning with respect to other parcels cited by Plaintiff do not establish that Defendants' rationale regarding the preservation of the industrial corridor is pretexual. In the 1980s and 90s, the Planning Board approved only one residential development in an industrial zone along the O&W corridor. All other residential developments in the vicinity of the corridor, including a senior citizen complex, the five unit dwellings and the condo complexes have been in residential districts. Further, the rezoning approvals cited by Plaintiffs occurred outside the O&W corridor, and are not relevant to the present action. Plaintiffs' contention that pretext is shown because the preservation of the industrial corridor was not raised until the

third meeting about the Formisano Property, are not borne out by the record. The preservation issue was, in actuality, raised by the first official to speak at the first meeting regarding the properties in August of 1994, during the portion of the discussion relating to the Rowley Property. Aug. Tr. at 145-6.

Disparate Impact

"A disparate impact analysis examines a facially neutral policy or practice, such as a hiring test or zoning law, for its differential impact or effect on a particular group." *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 933 (2d Cir. 1988). In order to establish a *prima facie* case of disparate impact, Plaintiffs must show that the Planning Board's practices "actually or predictably result in [] discrimination; in other words that it has a discriminatory effect." *Huntington*, 844 F.2d at 934. Once a *prima facie* case of disparate impact is established, Defendants must prove that their practice furthered a legitimate governmental interest and that there were no alternatives with less discriminatory effect. *Id.* at 933.

The Court assumes for the argument that Plaintiffs have established a *prima facie* case of disparate impact. Thus, the Court must determine "whether the proffered justification is of substantial concern such that it would justify a reasonable official in making this determination." *See Huntington*, 844 F.2d at 939. Here, the proffered justification of preserving the industrial corridor and maintaining orderly and productive land use were of substantial concern to Middletown and justified the Planning Board's decision.

Plaintiff's proposed alternatives for promoting industrial development do not address Defendants' preservation justification. Further, in terms of non-discriminatory alternatives, twenty-five to thirty-five percent of the City of Middletown is zoned appropriately for Plaintiff's use. A

reasonable alternative would be to have used any parcel within this portion of the City instead of the proposed property. Fusco Aff. *See Suffolk Interreligious Coalition on Housing, Inc. v. Town of Brookhaven*, 575 N.Y.S.2d 548, 550 (2d Dept. 1991) (denial had no discriminatory effect when available vacant land zoned for multi-family used existed). The Planning Board decided that Plaintiff's residences would be placed inappropriately in an area zoned for industrial use. Defendants did not preclude Plaintiff in any way from attempting to secure parcels of land in an area of Middletown appropriately zoned for its proposed use. In fact, it was Plaintiff who rejected the Planning Board's offer to reconvene to discuss alternative locations. The members of the Planning Board who voted against the project stated affirmatively and publicly that they would have voted in favor of the project if it had been in another location in Middletown and no reason is shown to doubt their sincerity. Arluck Aff., Swierksi Aff., Moson Aff. and Miner Aff.

Reasonable Accommodation

Defendants are required to give disabled individuals "reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." 42 U.S.C. §3604(f)(3)(B). To determine if a requested accommodation is required the Court must determine that the "permits would be granted for comparable "traditional" residences - that is, residences in which persons without disabilities can live...." *Forest City Daly Housing v. North Hempstead*, 175 F.3d 144, 146 (2d Cir. 1999). Reasonable accommodations are those which do not cause undue hardship or fiscal or administrative burdens on the municipality and do not undermine the basic purpose which the zoning ordinance at issue seeks to achieve.

Defendants offered to reconvene the Planning Board to find reasonable alternatives, but Plaintiff declined, ostensibly because of a temporary lack of funding at the time the offer was made. As no other Special Use Permits for residential use in the industrial district were issued by the Planning Board in the 1990s, Plaintiffs cannot establish a claim of failure to provide a reasonable accommodation.

The Claims Against Mayor DeStefano

As noted earlier, the United States has not intervened with respect to this aspect of the litigation. In all events, Mayor DeStefano individually is entitled to summary judgment in his favor because he was not a decision maker in the process through which Plaintiff's application was denied. *See X-Men Security Inc. v. Pataki*, 196 F.3d 56 (2d Cir. 1999) (Congressmen and NY State Assemblyman sued for advocating non-renewal of public contract because of plaintiff's affiliation with Nation of Islam). Plaintiff attempts to distinguish *X-Men* by showing that Mr. DeStefano had a political and social relationship with Planning Board members, certainly not an unusual situation for an elected official in a small community.[15] Plaintiff asserts that DeStefano opposed other social services programs by litigation and otherwise and that DeStefano's personal attorney was also the lawyer for the Planning Board. The Mayor had no voting power on the Planning Board and had no power to review the Board's decision. The facts alleged by Plaintiffs do not transform him into a Planning Board decision maker. The only formal relationship between the Planning Board and the Mayor is that the Mayor appoints Planning Board members who receive no salary. Their terms of office are seven years, thereby assuring their independence.

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[15] The population of the City of Middletown is approximately 25,000. Fusco Aff.

As emphasized also by our Court of Appeals in *X-Men*, Mayor DeStefano's speech as a member of the audience at a public hearing of the Planning Board is protected by the First Amendment for, "although a state agency that was a decision maker would be exposed to liability if it made its decision based on unlawful considerations that were argued to it, *see, e.g., United States v. Yonkers Board of Education*, 837 F.2d 1181, 1223-26 (2d Cir. 1987), *cert denied*, 486 U.S. 1055 (1988), speech by persons who are not decision makers and who merely engage in advocacy without threats, intimidation, or coercion is protected by the First Amendment." *X-Men*, 196 F.3d at 70.

There is no evidence of any communications or actions by Mayor DeStefano beyond the statements he made at the public hearings. His statements were political speech in an open political forum, and are protected by the First Amendment. For the foregoing reasons, the Court dismisses Plaintiff's FHA, ADA and Rehabilitation Act claims as against Mayor DeStefano.

Retaliation

To establish a *prima facie case* of retaliation, Plaintiff must establish (1) participation in a protected activity known to the defendant, (2) subsequent adverse action, and (3) evidence of a causal connection between the protected activity and the subsequent adverse action. *Richardson v. New York State Department of Correctional Services*, 180 F.3d 426, 443 (2d Cir. 1999). The burden then shifts to defendants to provide a non-discriminatory reason for its actions. *See id.* Once Defendants have done so, Plaintiff must prove that the proffered reason is pretextual. *See id.* Plaintiff has alleged sufficiently that RECAP was engaged in protected activity, specifically filing a complaint with HUD concerning the Planning Board decision, and the Court assumes for purposes of the motion that it

suffered an adverse action, specifically, the withdrawal of the "committed" funds.[16]

Plaintiff has alleged a causal connection between RECAP's protected activities and the withdrawal of the funding "commitment," if such it was, simply by showing that the protected activity was followed closely in time by the adverse action. The Office denied Plaintiff the funding while Plaintiff's HUD complaint was still being investigated. Plaintiff has alleged sufficiently a *prima facie* case of retaliation. *See DeCintio v. Westchester County Medical Center*, 821 F.2d 111, 115 (2d Cir.), *cert. denied*, 484 U.S. 965 (1987); *Colon v. Coughlin*, 58 F.3d 865, 872 (2d Cir. 1995).

Defendants, however, have provided nondiscriminatory justifications for their action. Defendants state that the Community Development Office declined to provide funding to Plaintiff because Plaintiff used a disapproved contractor, was not paying prevailing wage rates and because its available funds had been spent on other projects. This decision was made by Mr. Neil Novesky, the Director of the Community

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[16] In its opposition papers, Plaintiff also claims that it was engaged in protected activity with relation to an unrelated litigation involving PACER, a subsidiary of RECAP, against Middletown and in sending a letter to the City from RECAP's attorneys threatening legal action concerning the Formisano Property. Neither of these are appropriate bases for a retaliation claim. PACER, and not RECAP was a Plaintiff in *PACER v. Planning Board of the City of Middletown*, 217 A.D.2d 47 (3d Dept. 1995), which involved the denial of tax exemptions. The December 5, 1994, letter in which RECAP's attorney's threatened legal action in relation to the Formisano property was not authorized by RECAP's Board of Directors. *See* Ex. 2 to Figueroa Aff.; Ex. V to Smith Aff. Darden Dep. 484-92. Plaintiff told Defendants to disregard the letter, effectively making it a nullity. Roberts Aff. This withdrawn letter is not sufficient support for a claim of retaliation, as both Defendants and Plaintiffs were aware that it was not authorized.

Development Office.[17] RECAP presents no evidence that the expressed concerns of Mr. Novesky were pretextual. The disputed issues in the case as to whether the funds were a preliminary loan commitment or a firm grant commitment and whether or not the commitment, if such it was, had an expiration date, do not address the issue of whether Defendants stated justifications for the denial of the funding were pretextual. Plaintiff has failed to show pretext.

CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment is granted. The Clerk shall file a final judgment.

SO ORDERED.

Dated: White Plains, New York
September 25, 2000

s/CHARLES L. BRIEANT
Charles L. Brieant, U.S.D.J.

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[17] It was Mayor DeStefano who notified RECAP of the denial of the funds. As noted earlier, the Mayor found no financial irregularities on the part of RECAP.

Appendix B—Final Opinion of Hon. Robert Sack, USCJ, entered February 19, 2002

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2000
(Argued: June 7, 2001 Decided: February 5, 2002)
Docket Nos. 00-6318, 00-6354

REGIONAL ECONOMIC COMMUNITY ACTION PROGRAM, INC.,

Plaintiff-Appellant,

-and-

UNITED STATES OF AMERICA,

Intervenor-Plaintiff-Appellant,

-v.-

CITY OF MIDDLETOWN, CITY OF MIDDLETOWN PLANNING BOARD, and JOSEPH DESTEFANO,

Defendants-Appellees.

Before:

KEARSE, STRAUB, and SACK,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York (Charles L. Brieant, *Judge*)

granting summary judgment in favor of the defendants City of Middletown, City of Middletown Planning Board, and Joseph DeStefano on the 5th plaintiffs' claims of discrimination and retaliation in violation of the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, and the Rehabilitation Act, 29 U.S.C. § 701 *et seq.* The plaintiff Regional Economic Community Action Program, Inc., and intervenor-plaintiff the United States assert, *inter alia*, that the defendants unlawfully discriminated by denying Regional Economic Community Action Program a special-use permit authorizing it to establish two halfway houses for recovering alcoholics in Middletown. We hold that the district court erred by granting summary judgment to the defendants on the plaintiffs' claims of disparate treatment and retaliation. We affirm, however, the district court's grant of summary judgment on the plaintiffs' disparate impact and failure to make reasonable accommodation claims.

Affirmed in part; vacated in part; and remanded.

LESLIE A. LUPERT, Orans, Elsen & Lupert, LLP (Simeon Goldman, Disability Advocates, Inc., of counsel), New York, NY, *for Plaintiff-Appellant.*

JEFFREY OESTERICHER, Assistant United States Attorney for the Southern District of New York, (Mary Jo White, United States Attorney, and Neil M. Corwin and Sara L. Shudofsky, Assistant United States Attorneys, of counsel), *for Intervenor-Plaintiff-Appellant.*

ALEX SMITH (Robert N. Isseks, of counsel), Middletown, NY, *for Defendants-Appellees.*

SACK, *Circuit Judge*:

The plaintiff, Regional Economic Community Action Program, Inc. ("RECAP"), and the intervenor-plaintiff, the United States of America, brought this action under the Fair Housing Act, 42 U.S.C. § 3601 *et seq.* ("FHA"), the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA"), and the Rehabilitation Act, 29 U.S.C. § 701 *et seq.* They alleged that the defendants--the City of Middletown ("Middletown" or "the City"), located in Orange County, New York, the City of Middletown Planning Board ("Planning Board"), and Joseph DeStefano, the mayor of Middletown--discriminated against RECAP on the basis of its clients' disabilities by refusing to grant RECAP a special-use permit authorizing it to establish two halfway houses for recovering alcoholics. The United States District Court for the Southern District of New York (Charles L. Brieant, *Judge*) granted summary judgment to the defendants on all of the plaintiffs' claims. Because we find sufficient evidence from which a reasonable juror could infer disparate treatment by the City and the Planning Board and retaliation by the City and DeStefano, we vacate the district court's grant of summary judgment as to those claims. But we affirm the court's grant of summary judgment on the disparate impact claim against all three defendants and the discrimination claims against DeStefano.

BACKGROUND

I. The RECAP Project

Because the plaintiffs appeal from the grant of a summary judgment against them, we recite the relevant facts in the light most favorable to them. *See Holtz v. Rockefeller & Co.*, 258 F.3d 62, 69 (2d Cir. 2001).

RECAP, a not-for-profit corporation founded in 1965, provides education, housing, social services, and other forms of assistance to low income individuals in Orange County, New York. In 1994, RECAP sought to create a "family support community" in the City by consolidating the operation of several proposed and existing assistance programs on two parcels of land near its existing outpatient clinic for recovering alcoholics. RECAP's plan involved three properties: (1) its existing facility located at 40 Smith Street; (2) a parcel of land directly across the street owned by Gary Formisano (the "Formisano property"); and (3) the lot adjacent and to the north of the Formisano property, owned by Richard Rowley (the "Rowley property").

A railroad track once owned by the Ontario & Western Railroad ("O & W") runs along the eastern borders of both the Rowley and Formisano properties. A rail spur on the Rowley property connects it to the O & W track. RECAP intended to use the Rowley property for "Head Start" classes, daycare for infants, and pediatric medical and dental services. It planned to convert an existing building on the Formisano property into a halfway house for twenty-four men recovering from alcoholism. Finally, RECAP's plan contemplated the construction of a new building located partly on the Rowley property and partly on the Formisano property to house twenty recovering alcoholic mothers and their children. Full-time staff would supervise both halfway houses twenty-four hours a day.

In 1994, Middletown's zoning ordinances applicable to these properties authorized "cumulative zoning," which allows both residential and commercial uses in an industrial zone. The Rowley property was zoned "I-2," or heavy industrial; the Formisano property was zoned "I-1," or light industrial. Both the childcare facility proposed for the Rowley property and the halfway houses proposed for the Formisano and Rowley

properties were permitted uses under these zoning ordinances, but each required a special-use permit from the Planning Board. All zones, both residential and industrial, require special-use permits for the construction of multi-family housing units. The purpose of a special-use permit is to allow the Planning Board to determine whether a proposed project will have an unduly adverse effect on the neighborhood. *See Pacer, Inc. v. Planning Bd.*, 217 A.D.2d 47, 50-51, 635 N.Y.S.2d 704, 705-06 (3d Dep't 1995).

Although both properties were part of a single project, RECAP had to apply to the Planning Board separately for a special-use permit for each property. The Planning Board considered RECAP's application regarding the Rowley property, where RECAP planned to establish the childcare center, during two hearings held in August and September 1994. It unanimously approved the special-use permit for that property at the September hearing, subject to negotiation of a specific agreement for the payment of taxes and confirmation that the project would not adversely affect the environment.

The Planning Board first considered RECAP's application for a special-use permit for the Formisano property--the parcel where RECAP intended to establish one halfway house for recovering alcoholics, and part of the home for recovering alcoholic mothers and their children--at the August 1994 hearing. This and subsequent hearings about the Formisano property became, unlike the discussions about the Rowley property, contentious. The Planning Board debated RECAP's application at four hearings held between August 1994 and December 1994. At the final meeting in December, the members of the Planning Board denied RECAP's application by a vote of four to two.

Shortly thereafter, RECAP requested that the Planning Board reconvene to consider providing a reasonable

accommodation for RECAP's clients' disabilities and to reconsider its decision to deny RECAP a special-use permit for the halfway houses that it proposed to establish on the Formisano property. The City did not respond to that request until June 1995. By then, RECAP, having lost a prospective grant, could no longer finance the project. Further details with respect to the Planning Board's deliberations on whether to issue the special-use permit for the Formisano property are set forth below in the "Discussion" section of this opinion.

II. Events Leading to RECAP's Retaliation Claim

In the early 1990s, RECAP acquired a building at 208 North Street, also in Middletown, where it planned to create a facility for the homeless. By letter dated June 23, 1993, the City's Office of Community and Economic Development informed RECAP that it would be "pleased to provide [a] commitment of $53,139 for the purchase of furnishings for the [North Street] project...." Antonio Figueroa, now RECAP's Director of Special Projects/ Facilities, subsequently spoke several times with Neil Novesky, Director of the Office of Economic and Community Development, updating him on the progress of the project. Novesky told Figueroa that once RECAP notified him that the construction was complete, RECAP could draw down the committed funds.

On December 5, 1994, four days after the Planning Board denied RECAP the Formisano permit, counsel for RECAP wrote to defendant DeStefano alleging that the permit denial violated the FHA and the ADA. He threatened legal action unless the Board rescinded its decision. Three days later, on December 8, RECAP completed construction of the North Street project and requested release of the promised funds. The City responded in a letter the same day by requesting that RECAP submit certain forms required for withdrawal of the funds, and telling RECAP that it would forward these forms.

RECAP never received them. Instead, Figueroa called the assistant as recommended in the letter. She referred him back to Novesky, who in turn told Figueroa that he would have to speak to Alex Smith, assistant corporation counsel to the City. Smith then informed Figueroa that the funds the City had promised to RECAP would be in the form of a loan rather than a grant.

On December 20, 1994, Smith telephoned Figueroa to tell him that Mayor DeStefano was worried about RECAP's ability to secure this loan. Smith said, according to Figueroa's affidavit, that "if RECAP had not pursued legal action against the Mayor, he would be much more cooperative" and that "RECAP has to learn not to bite the hand that feeds it." On December 31, RECAP filed a complaint regarding the denial of the Formisano permit with United States Department of Housing and Urban Development ("HUD"). In April 1995, RECAP received a letter from DeStefano raising financial and labor concerns about the North Street project. RECAP responded on April 13 with a letter seeking to allay DeStefano's concerns, but received no reply. RECAP heard nothing further until early 1996, when DeStefano informed RECAP that the City had withdrawn its funding commitment.

III. Proceedings in the District Court

In November 1997, RECAP brought this action alleging that the defendants unlawfully denied RECAP a special-use permit for the Formisano property. RECAP alleged that the defendants acted with a "discriminatory motive to prevent persons with disabilities from obtaining suitable housing in Middletown," Compl. ¶ 68, and intentionally failed "to make reasonable accommodations in Middletown's and the Planning Board's rules, policies, practices and services when such accommodations are necessary to afford people with disabilities equal opportunity to use and enjoy dwellings," Compl. ¶ 72, in

violation of the FHA, the ADA, and the Rehabilitation Act. RECAP further argued that because Middletown's zoning ordinances had a disparate and adverse impact on disabled individuals, they violate the FHA. Finally, RECAP asserted a separate retaliation claim against DeStefano and the City based on their alleged refusal to honor funding commitments to RECAP with respect to the North Street project.

In June 1998, the district court permitted the United States to intervene in these proceedings. The United States named the City as the sole defendant and alleged that it had discriminated against RECAP in violation of the FHA, the ADA, and the Rehabilitation Act when the Planning Board denied RECAP a special-use permit for the Formisano property.

In February 2000, the defendants moved for summary judgment on all claims. First, they argued that the recovering alcoholics whom RECAP intended to shelter in the halfway houses were not disabled within the meaning of the FHA, the ADA, or the Rehabilitation Act. Second, they contended that, in any event, their decision to deny RECAP the special-use permit was based on legitimate, non-discriminatory reasons. Finally, they argued that summary judgment should be granted on the plaintiffs' disparate impact and reasonable accommodation theories of liability and on RECAP's retaliation claim.

On September 25, 2000, the district court granted the defendants' motion for summary judgment on all of the plaintiffs' claims. The district court concluded, *inter alia*, that with regard to the plaintiffs' disparate treatment claim, the defendants had articulated legitimate, non-discriminatory reasons for their action, and the plaintiffs had failed to show that those reasons were a pretext for unlawful discrimination. The district court also granted summary judgment on RECAP's

disparate impact, reasonable accommodation, and retaliation claims. This appeal followed.[1]

DISCUSSION

I. Standard of Review

We review the district court's grant of summary judgment *de novo*, construing the evidence in the light most favorable to the non-moving party. See *Tenenbaum v. Williams*, 193 F.3d 581, 593 (2d Cir.1999), *cert. denied*, 529 U.S. 1098 (2000). Summary judgment is required where "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law," Fed.R.Civ.P. 56(c), i.e., "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). A fact is "material" for these purposes if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

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[1] The district court granted DeStefano summary judgment on the discrimination claims on the independent ground that he was not a decision maker in the process through which the Planning Board denied RECAP the special-use permit and therefore could not be held personally liable. The plaintiffs do not dispute the merits of this decision on appeal and thus waive any appeal of that decision. *See* Fed. R.App. P. 28(a)(5); *LoSacco v. City of Middletown*, 71 F.3d 88, 92-93 (2d Cir.1995). For this reason, we do not address the grant of summary judgment to DeStefano on the plaintiff's discrimination claims. The district court's judgment in that regard remains undisturbed. The court's dismissal of the discrimination claims against DeStefano, however, does not require dismissal of the retaliation claim. *Cf. McMenemy v. City of Rochester*, 241 F.3d 279, 283 (2d Cir.2001) (noting that Title VII prohibits retaliation against an employee who opposes "*any* practice made an unlawful employment practice," not just those of the defendant) (quoting 42 U.S.C. § 2000e- 3(a) (emphasis added)).

II. The Statutory Framework

The plaintiffs assert claims under three federal statutes: the FHA, the ADA, and the Rehabilitation Act. The FHA makes it unlawful "[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap." 42 U.S.C. § 3604(f)(1). It defines discrimination to include "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a handicapped] person equal opportunity to use and enjoy a dwelling." *Id.* § 3604(f)(3)(B). The ADA and the Rehabilitation Act also prohibit all discrimination based on disability by public entities. Each statute requires that covered entities make reasonable accommodations in order to provide qualified individuals with an equal opportunity to receive benefits from or to participate in programs run by such entities. Specifically, the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity," 42 U.S.C. § 12132; and the Rehabilitation Act states that "[n]o otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance...." 29 U.S.C. § 794(a). "All three statutes apply to municipal zoning decisions." *Forest City Daly Hous., Inc. v. Town of North Hempstead*, 175 F.3d 144, 151 (2d Cir.1999); *see also Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 44 (2d Cir.1997) (ADA and the Rehabilitation Act apply to zoning decisions), *overruled on other grounds by Zervos v. Verizon New York*, 252 F.3d 163, 171 n. 7 (2d Cir.2001).

III. Whether RECAP's Clients are Disabled Within the Meaning of the ADA, the FHA, and the Rehabilitation Act

The defendants first argue that RECAP's clients are not "disabled" within the meaning of the FHA, the ADA, and the Rehabilitation Act.[2] Notwithstanding this contention, the district court assumed that the prospective residents of the halfway houses meet the statutory definition of "individual with a disability." We agree that they do.

To demonstrate a disability under each of these statutes, a plaintiff must show: (1) a physical or mental impairment which substantially limits one or more major life activities; (2) a record of having such an impairment; or (3) that they are regarded as having such an impairment. *See* 42 U.S.C. § 3602(h); 42 U.S.C. § 12102(2); 29 U.S.C. § 705(20). RECAP's clients fall into the first two categories.

In the first category, an individual is considered disabled if he or she: (1) suffers from a physical or mental impairment, that (2) affects a major life activity, and (3) the effect is "substantial." *See Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).

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[2] The defendants do not challenge RECAP's standing to bring suit. Mindful of the necessity of standing to our jurisdiction, *see Leibovitz v. N.Y. City Transit Auth.*, 252 F.3d 179, 184 (2d Cir.2001), however, we observe that RECAP has standing both as an individual plaintiff and under organizational standing theory. *See Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 649 (2d Cir.1998). RECAP suffered an injury through the denial of its special-use permit application; it therefore has individual standing. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 905 (2d Cir .1993). Second, RECAP serves a class of individuals with discrimination claims; the interests at issue are germane to RECAP's purpose; and no individual participation is required under these circumstances. It therefore also meets the organizational standing requirements of *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 347 (1977).

RECAP's clients suffer from alcoholism. Alcoholism, like drug addiction, is an "impairment" under the definitions of a disability set forth in the FHA, the ADA, and the Rehabilitation Act. *See Buckley v. Consol. Edison Co.*, 155 F.3d 150, 154 (2d Cir.1998) (in banc) (recovering drug addict may be considered to have a "disability" under the ADA); *Teahan v. Metro-North Commuter R.R. Co.*, 951 F.2d 511, 518 (2d Cir.1991) (discrimination against substance abusers illegal under the Rehabilitation Act); *Rodgers v. Lehman*, 869 F.2d 253, 258 (4th Cir.1989) (holding that "[a]lcoholism is a handicapping condition within the meaning of the [Rehabilitation] Act"); *Sullivan v. City of Pittsburgh*, 811 F.2d 171, 182 (3d Cir.1987) ("Case law establishes that alcoholics are handicapped within the meaning of [the Rehabilitation Act]."). Legislative history also supports this conclusion. *See* H.R.Rep. No. 101-485(II), at 51 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 333 (noting that "physical or mental impairment" includes "drug addiction and alcoholism") (internal punctuation omitted). RECAP's clients therefore meet the first part of the definition of a disability.

But mere status as an alcoholic or substance abuser does not necessarily imply a "limitation" under the second part of that definition. See *Burch v. Coca- Cola Co.*, 119 F.3d 305, 316-17 (5th Cir.1997) (holding that alcoholism is not a per se disability under the ADA and evidence that alcoholics, in general, are impaired is inadequate to show the substantial limitation of one or more major life activities), *cert. denied*, 522 U.S. 1084 (1998). To prevail, a recovering drug addict or alcoholic "must demonstrate [not only] that he [or she] was actually addicted to drugs or alcohol in the past, [but also] that this addiction substantially limit[s] one or more of his [or her] major life activities." *Id.* at 274.

As the Supreme Court recently observed, "[T]o be substantially limited . . . , an individual must have an impairment that prevents or severely restricts the individual

from doing activities that are of *central importance to most people's daily lives." Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, __, 122 S.Ct. 681, 691 (2002). The impairment's impact must also be "permanent or long-term." *Id.* Major life activities include "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 28 C.F.R. § 41.31(b)(2); 45 C.F.R. § 84.3(j)(2)(ii); 24 C.F.R. § 100.201(b). The function of "caring for one's self," we have held, "encompasses normal activities of daily living; including feeding oneself, driving, grooming, and cleaning home." *Ryan v. Grae & Rybicki, P.C.*, 135 F.3d 867, 871 (2d Cir.1998) (citing *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 (5th Cir.1995)). *Williams*, confirms that such "tasks central to most people's daily lives" constitute major life activities. 534 U.S. at __, 122 S.Ct. at 693.

RECAP's clients qualify to live in a halfway house because they need its supportive environment. New York State regulations prescribe admission criteria that would have applied to the proposed Formisano-property halfway houses. *See* N.Y. Comp.Codes R. & Regs. tit. 14, § 375.8(c). Only "persons who are unable to maintain abstinence and continued recovery in an available independent living situation" would have had access to the facilities. *Id.* § 375.1. In particular, RECAP could only have admitted persons who, *inter alia*, (1) had been "diagnosed as suffering from alcohol dependence"; (2) had "completed a course of alcoholism treatment" in an inpatient or outpatient setting; (3) were "determined to be unable to abstain without continued care in a structured supportive setting"; and (4) were "in need of alcoholism services on an outpatient basis in addition to the supportive counseling available in the halfway house." *Id.* § 375.8(c). Residents cannot remain once they have "attained the skills and ability necessary to maintain abstinence and continue recovery in ... suitable independent living." *Id.* § 375.1(g).

We therefore conclude, as did the United States District Court for the District of New Jersey on a similar issue, that RECAP's clients' "addictions substantially limit their ability to live independently and to live with their families"; that they are "entitled thereby to the protections of [the FHA, ADA, and the Rehabilitation Act]"; and that their "inability to live independently constitutes a substantial limitation on their ability to 'care for themselves.' " *United States v. Borough of Audubon*, 797 F.Supp. 353, 359 (D.N.J.1991), *aff'd*, 968 F.2d 14 (3d Cir.1992). Because the inability to live independently without suffering a relapse--a baseline prerequisite for admittance to the RECAP facility--limits the major life activity of "caring for one's self," an activity that is "necessarily [an] important part[ ] of most people's lives," *Williams*, 534 U.S. at ___, 122 S.Ct. at 693, the residents of the proposed halfway houses would have met the second part of the statutory definition of a disability. All of the halfway house's residents must be substantially impaired in a major life activity to continue residing there.[3]

Finally, to qualify as disabled, the limitation of RECAP's clients must have been "substantial." A limitation is substantial if it "[s]ignificantly restrict [s] . . . the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. § 1630.2(j)(1). Individuals must show only "substantial limitations," not "utter inabilities," to qualify for statutory protection. Bragdon, 524 U.S. at 641. Here, the plaintiffs' clients would have been deemed substantially limited because they

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[3] While the determination of substantial impairment is admittedly made "in . . . a case-by-case manner," the existence of statutorily defined levels of impairment obviates the concern expressed in *Williams* about varying intensities of symptoms. *Id.* 534 U.S. at __, 122 S.Ct. at 692.

are unable to abstain from alcohol abuse without continued care; absent assistance, they cannot adequately care for themselves. *See Borough of Audubon*, 797 F.Supp. at 359 (finding a substantial limitation under analogous circumstances). Their impairment is also long-term. *See Williams*, 534 U.S. at __, 122 S.Ct. at 691. Under New York law, a halfway house admits only those to be discharged "between three and nine months after admission." N.Y. Comp.Codes R. & Regs. tit. 14, § 375.8(g); *see also id.* § 375.8(f)(3) (providing for monthly assessments).

In any event, even if RECAP's clients did not meet the first definition of a disability, they would qualify under the second because they have a record of having an impairment. *See* 42 U.S.C. § 12102(2)(B).

IV. Analysis of the Plaintiffs' Claims

Plaintiffs who allege violations under the ADA, the FHA, and the Rehabilitation Act may proceed under any or all of three theories: disparate treatment, disparate impact, and failure to make reasonable accommodation. *See Doe v. Pfrommer*, 148 F.3d 73, 82 (2d Cir.1998) (noting the possible application of these three theories under the ADA and the Rehabilitation Act); *see also Forest City Daly Hous., Inc.*, 175 F.3d at 150-51 (all three statutes permit reasonable accommodation claims); *Smith & Lee Assocs., Inc. v. City of Taylor*, 102 F.3d 781, 790 (6th Cir.1996) (FHA permits all three theories). The plaintiffs in this case make claims under each.

A. Disparate Treatment Theory

The plaintiffs allege that the Planning Board denied RECAP's application for a special use permit for the Formisano property because of the identity of the residents of the proposed halfway houses--recovering alcoholics. The district court concluded, however, that the plaintiffs had failed to raise

a triable issue of fact as to whether the Planning Board's stated reason for the denial was a pretext for discrimination. We disagree.

We analyze claims of intentional discrimination under the FHA, the ADA, and the Rehabilitation Act under the familiar *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), burden-shifting analysis established for employment discrimination cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. *See Smith & Lee Assocs., Inc.*, 102 F.3d at 790-91; *Cabrera v. Jakabovitz*, 24 F.3d 372, 380-84 (2d Cir.1994). Under this scheme, the plaintiffs must first establish a prima facie case of discrimination. See *McDonnell Douglas*, 411 U.S. at 802.

To establish a prima facie case of discrimination under the FHA and the ADA, the plaintiffs must present evidence that "animus against the protected group was a significant factor in the position taken by the municipal decision-makers themselves or by those to whom the decision-makers were knowingly responsive." *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 425 (2d Cir.1995) (emphasis added; citation and internal quotation marks omitted); *see also Smith & Lee Assocs.*, 102 F.3d at 790 (noting that to establish a prima facie case, the plaintiff must show "that discriminatory purpose was a motivating factor in the City's decision to deny . . . [the] petition") (citation and internal quotation marks omitted). To establish a prima facie case of discrimination under the Rehabilitation Act, by contrast, the plaintiffs must show that the defendants denied the permit "solely" because of the disability. *See Flight v. Gloeckler*, 68 F.3d 61, 64 (2d Cir.1995).

If the plaintiffs make out a prima facie case, then the burden of production shifts to the defendants to provide a legitimate, nondiscriminatory reason for their decision. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142

(2000); *Heyman v. Queens Vill. Comm. for Mental Health for Jamaica Cmty. Adolescent Program, Inc.*, 198 F.3d 68, 72 (2d Cir.1999). If the defendants meet that burden, "the *McDonnell Douglas* framework . . . disappear[s] and the sole remaining issue [is] discrimination *vel non*." *Reeves*, 530 U.S. at 142-43 (citations and internal quotation marks omitted). The plaintiffs must then prove that the defendants intentionally discriminated against them on a prohibited ground. *See id.* at 143. Where, however, the plaintiffs "make a substantial showing" that the defendants' proffered explanation was false, "it is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." *Id.* at 146- 47 (emphasis in original).

The district court in this case concluded that the plaintiffs had failed to demonstrate the presence of a triable issue of fact as to whether the defendants' "articulated, legitimate, non-discriminatory" reasons were pretextual. *Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown*, No. 97 Civ. 8808(CLB) (S.D.N.Y. Sept. 25, 2000), slip op. at 13. We disagree. Based on the evidence in the record, we think that a reasonable juror could conclude that the defendants' proffered reason for denying RECAP a special-use permit was a pretext for unlawful discrimination.

"Discriminatory intent may be inferred from the totality of the circumstances, including . . . the historical background of the decision . . . ; the specific sequence of events leading up to the challenged decision . . . ; [and] contemporary statements by members of the decisionmaking body. . . ." *LeBlanc*, 67 F.3d at 425 (citations and internal quotation marks omitted). The district court correctly decided that the plaintiffs introduced sufficient evidence from which a reasonable juror could conclude that the plaintiffs made out a prima facie case. Their initial burden of production under the *McDonnell Douglas* analysis is "minimal." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S.

502, 506 (1993); *McGuinness v. Lincoln Hall*, 263 F.3d 49, 53 (2d Cir. 2001). City officials and Planning Board members made numerous statements from which a reasonable juror could infer that they denied RECAP's permit application because of the identity of its clients. For example, Mayor DeStefano began the August 1994 hearing about the Formisano permit by stating:

> And what I have tried to convey to RECAP and through different surrogate[s] is that enough is enough. And that in order for RECAP to maintain the level of respect in the community, to maintain the level of cooperation from not only governmental agencies, but this people [sic] that live in and around these areas, that they have to recognize that Middletown is not the hub of human services programs. . . . But at some point we have tried to say to the different not for profit agencies that in regards to housing enough is enough. That the city is over and above has done more than we probably should have done [sic]. . . . Do [this project] in Goshen. Do it in Warwick. Do it in Montgomery. Find a building there. Do it in some other community that has not contributed to the extent, not even close to what Middletown has contributed in regards to participation and human service programs.

He later added that "I told [the head of RECAP] two or three years ago that he would have trouble getting that type of project through the City; that this City has done more than its share."

Other City officials made similar comments. Alex Smith, counsel to the Planning Board, asked at the September 1994 hearing: "Does it make more sense to have a facility in Newburgh and Greenville [two other Orange County communities], or maybe we should have two in Newburgh. I think this Board has the right to make those kinds of value

judgments." He later expressed concern that the City had no guarantee that "these people [RECAP's clients] would or would not have criminal histories." He also echoed Mayor DeStefano's view that "[t]he problem is that . . . there seems to be a tremendous over-concentration of these types of facilities [i.e., halfway houses] in this City as compared to the surrounding townships." At the November hearing, the City's Director of Economic and Community Development told the Planning Board that "if the [Formisano] building is occupied by a certain type of social service or support service program, perhaps occupying the building next door will be deterred."

The evidence suggests that the Planning Board members may have been similarly motivated. One board member said: "The question that we're all wrestling with ... is if this is very wide spread [sic] in our society and there's a great need for this everywhere, as we will all admit, why do we have to have all the treatment facilities right here in Middletown?" At the end of the September hearing, the chairman of the Planning Board concluded that "[t]here's a need for this project. There's some issues [sic] about whether it should be in Middletown, and that's what it boils down to. . . ." Before the final vote in December, the chairman recommended that the Planning Board deny RECAP a special-use permit because "there's an over-concentration of residential and social service facilities in the City." When he cast his vote, yet another board member remarked: "I believe that the City itself has extended itself and embraced significant other services that have come our way, and I have to say that for us to be the magnet for the area is not necessarily the best industrial development of this or any other project." This evidence more than suffices to establish the plaintiffs' prima facie case.

Second, as the district court correctly determined, the defendants met their subsequent burden of production, *see Reeves*, 530 U.S. at 142, by articulating legitimate, non-

discriminatory reasons for their denial of the Formisano property permit. They maintain that they denied RECAP a special-use permit in order to preserve the land along the O & W railroad line for industrial development and also to protect the halfway house residents from the nuisance effect of the railroad.

We disagree, however, with the district court's third conclusion: that the plaintiffs did not introduce evidence that raises a genuine issue of material fact as to whether the defendants' proffered reasons were a pretext for unlawful discrimination. To establish such pretext, in addition to the evidence that supports their prima facie case, the plaintiffs rely on three categories of evidence: (1) the granting of a special-use permit for the Rowley property, (2) deposition testimony, and (3) a map of the surrounding area. A review of the record on appeal indicates at a minimum that this evidence casts doubt on the defendants' proffered reasons for denying RECAP a special use permit.

At the August 1994 hearing, the Planning Board approved a special-use permit for the Rowley property, where RECAP intended to build a childcare facility. In December 1994, the Board rejected RECAP's application for a special-use permit for the Formisano property, where RECAP intended to establish the halfway houses. The applications for both properties were made at the same time, by the same entity, for adjoining properties; the principal difference between them seems to be the people whom the projects sought to serve: The Rowley property would serve children, and the Formisano property would serve recovering alcoholics. The plaintiffs argue persuasively that if industrial growth and development were the Planning Board's true concerns, then the Board would have also raised the issue in connection with the Rowley property. Indeed, the two- and-one-half acre Rowley property is five times the size of the Formisano property; it has a rail spur that

connects it to the O & W track; and it is zoned for heavy rather than light industrial use. For these reasons, it arguably would be more attractive than the Formisano property for industrial use.

The district court found that "[t]he Head Start program to be conducted on the Rowley property involves a non-residential facility operating only in daylight hours, which would provide support services that would facilitate desired industrial development." *Reg'l Econ. Cmty. Action Program, Inc.*, slip op at 14. We find no support for the conclusion that the Head Start program would facilitate industrial development. The defendants provide no evidence, for example, that industrial workers' children would be eligible for a Head Start program. *Cf. Head Start 2001 Poverty Guidelines, at http://www.headstartinfo.org/*publications.htm (last modified Oct. 31, 2001) (detailing income restrictions for Head Start children's families).

The plaintiffs also introduced evidence that calls into question the defendants' second proffered reason for denying RECAP a special-use permit: to protect the halfway house residents from the nuisance effect of the railroad. The evidence indicates that at the time of the Planning Board's decision, trains rarely traveled on the O & W line; when they did, it was at very low speeds. A reasonable juror might wonder why the Planning Board worried more about the impact of the railroad on recovering alcoholics than on the children whom it knew would be receiving education, medical attention, and other social services at the adjoining Rowley property. More generally, a juror could infer that if the industrial development and railroad-nuisance concerns led the Planning Board to deny RECAP the special-use permit for the Formisano property, then these same concerns would have led the Planning Board to deny it a special-use permit for the Rowley property. These inferences could establish that the Planning Board's disparate

treatment of these two properties demonstrates intentional discrimination against recovering alcoholics and that its stated concerns about the Formisano property were pretextual.

The Planning Board members' deposition testimony provides additional evidence of pretext. When questioned about the reason for the Board's disparate treatment of the two properties, one member testified: "I cannot recall what I thought at the time, what other people thought at the time and in what detail the economic development argument began to figure in. So I can't really recall specifically what the distinction was." That same member also testified that "the concern that Middletown had a high number of treatment facilities in general was certainly brought home to me, was certainly a recurring theme in this overall discussion." Another Planning Board member stated that he was not concerned with industrial or commercial development in relation to the Rowley property permit.

Finally, the plaintiffs supplied the district court with a map of the area as it existed in 1994. The map appears to show that the area surrounding the properties in question was not largely industrial. If true, this may cast doubt in jurors' minds upon the defendants' assertion that they sought to "preserve" it as an industrial area.

Based on this evidence, then, a reasonable juror could refuse to credit the defendants' stated reasons for denying RECAP a special-use permit and find that the real reason was discrimination based on the identity of RECAP's clients. The evidence also would suffice to permit a rational juror to find that the defendants denied RECAP the permit *solely* because of RECAP's clients' disabilities--the more demanding finding required for the plaintiffs to make out a cause of action under the Rehabilitation Act. We therefore hold that the district court

erred by granting summary judgment to the defendants on each of the three statutory claims.

B. Disparate Impact Theory

RECAP also asserts a cause of action under the FHA and ADA because the Planning Board's denial of the special-use permit had a "disparate impact" on people with disabilities. The FHA and the ADA provide relief not only from policies adopted and actions taken with a discriminatory intent, but also from the application of facially neutral standards that have an unlawful discriminatory effect upon a protected class. *See LeBlanc-Sternberg*, 67 F.3d at 425; *Huntington Branch, NAACP* v. *Town of Huntington*, 844 F.2d 926, 933- 34 (2d Cir.1988). We agree with the district court, however, that in the present case, as a matter of law, the defendants' actions cannot give rise to a disparate impact claim.

"A disparate impact analysis examines a facially-neutral policy or practice, such as a hiring test or zoning law, for its differential impact or effect on a particular group." *Huntington Branch, NAACP*, 844 F.2d at 933. To establish a prima facie case under this theory, the plaintiff must show: "(1) the occurrence of certain outwardly neutral practices, and (2) a significantly adverse or disproportionate impact on persons of a particular type produced by the defendant's facially neutral acts or practices." *Gamble v. City of Escondido*, 104 F.3d 300, 306 (9th Cir.1997) (internal quotation marks and citation omitted); *see also Huntington Branch, NAACP*, 844 F.2d at 934.

For example, a handicapped person might challenge a zoning law that prohibits elevators in residential dwellings. That neutral law might have a disproportionate impact on such a plaintiff and others with similar disabilities, depriving them of an equal opportunity to use and enjoy dwellings there. Here, by contrast, RECAP does not challenge a facially neutral policy

or practice; it challenges one specific act: the denial of a special-use permit for the Formisano property. No comparison of the act's disparate impact on different groups of people is possible. RECAP therefore fails to allege a cognizable cause of action under a disparate impact theory, and the district court correctly granted the defendants summary judgment on this claim.

C. Reasonable Accommodation Theory

For similar reasons, RECAP and the United States fail to state a claim upon which relief can be granted under a reasonable accommodation theory. A municipality discriminates in violation of the FHA, the ADA, or the Rehabilitation Act if it refuses to make changes to "traditional rules or practices if necessary to permit a person with handicaps an equal opportunity to use and enjoy a dwelling." *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 333 (2d Cir.1995) (quoting H.R.Rep. No. 711, 100th Cong., 2d Sess. (1988), *reprinted at* 1988 U.S.C.C.A.N. 2173, 2186). Returning to the example of the zoning ordinance prohibiting elevators, a proper reasonable accommodation claim might assert that the zoning authority should have waived or modified its rule against elevators in residential dwellings to permit those who need them to use them and thereby have full access to and enjoyment of residences there. *See Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 301-02 (2d Cir.1998) (providing examples of typical accommodation cases).

Here, however, the zoning rules do not prohibit the proposed halfway houses in the first place. The plaintiffs do not seek a variance to a traditional rule or practice that was neutrally applied. Rather, they challenge the defendants' specific decision to deny RECAP a special-use permit for discriminatory reasons. The plaintiffs' argument in this case is that the Planning Board determined that the planned use

would have an adverse effect on the neighborhood because of an illegitimate reason, the identity of the group of users. Because the plaintiffs do not point to the prerequisite neutral application of a rule, they fail to state a claim under a reasonable accommodation theory.

V. The Retaliation Claim

Finally, RECAP alleges that the defendants retaliated against it for threatening to complain and actually complaining about the denial of the permit by withdrawing funds committed to it by the City for a different project. We conclude that this allegation states a claim against the City and DeStefano.

Under the FHA, it is unlawful, "to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by [*inter alia*, section 3604] of this title." 42 U.S.C. § 3617. The ADA and Rehabilitation Act include similar prohibitions. *See* 42 U.S.C. § 12203(b); 29 U.S.C. § 791(g). We apply the *McDonnell Douglas* burden-shifting rules to claims of retaliation pursuant to these statutes. *See Sarno v. Douglas Elliman-Gibbons & Ives, Inc.*, 183 F.3d 155, 159 (2d Cir.1999); *Richardson v. N.Y. State Dept. of Corr. Serv.*, 180 F.3d 426, 443 (2d Cir.1999). RECAP therefore must first establish a prima facie case of retaliation. Richardson, 180 F.3d at 443. It must show "that [it was] engaged in protected activity, that the [defendant] was aware of this activity, that the [defendant] took adverse action against the plaintiff, and a causal connection exists between the protected activity and the adverse action, i.e., that a retaliatory motive played a part in the adverse employment action." *Sands v. Runyon*, 28 F.3d 1323, 1331 (2d Cir.1994) (discussing the elements of a retaliation claim under the

Rehabilitation Act) (internal quotation marks omitted); *see also Weissman v. Dawn Joy Fashions Inc.*, 214 F.3d 224, 234 (2d Cir.2000) (discussing the elements of an ADA retaliation claim); *San Pedro Hotel Co., Inc. v. City of Los Angeles*, 159 F.3d 470, 477 (9th Cir.1998) (discussing the elements of a FHA retaliation claim).

RECAP elicited sufficient evidence to support a prima facie case of retaliation against the City and DeStefano. RECAP's letter dated December 5, 1994, and its filing of a complaint with the HUD were protected activities. Both constitute "oppos[ition to] an[ ] act or practice made unlawful" by the applicable anti-discrimination statutes. 42 U.S.C. § 12203(a); *see also Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 566 (2d Cir. 2000) (defining protected activity as "action taken to protest or oppose statutorily prohibited discrimination"). The defendants do not assert that they were unaware of this activity. RECAP suffered an adverse action in losing funding that had been committed to it, and the events leading to the ultimate loss of funding began very shortly after RECAP's protected activity.

"The causal connection needed for proof of a retaliation claim can be established indirectly by showing that the protected activity was closely followed in time by the adverse action." *Cifra v. Gen. Elec. Co.*, 252 F.3d 205, 217 (2d Cir.2001) (citation and internal quotation marks omitted). We "ha[ve] not drawn a bright line to define the outer limits beyond which a temporal relationship is too attenuated to establish a causal relationship. . . ." *Gorman-Bakos v. Cornell Coop. Extension*, 252 F.3d 545, 554 (2d Cir. 2001). An inference of a causal relationship might be made based on Smith's comment to Figueroa that RECAP should not "bite the hand that feeds it." While the ultimate denial of funding did not occur immediately after the protected activity, a reasonable juror could conclude that the defendants withdrew RECAP's funding because of the events following the denial of the Formisano property permit.

The defendants proffer two legitimate, non-retaliatory reasons for the withdrawal of funds: (1) the funding was only available for a limited time period; and (2) RECAP employed banned contractors. RECAP presents sufficient evidence to raise a material issue of fact as to whether these proffered reasons were a pretext for retaliation. We note, moreover, that the defendants offer no evidentiary support for the non-retaliatory reasons they proffer, and we find no indication in the record that the funding was only offered for a limited time. We further note that although RECAP responded to the defendants' expressed concerns about the project, the defendants neither answered this response nor indicated that the issue that gave rise to it continued to concern them. A reasonable juror could conclude that the defendants are now citing these reasons in order to obscure their retaliatory motive. We therefore hold that summary judgment should not have been granted on RECAP's retaliation claim against the City and DeStefano.

CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion.

Appendix C—Fair Housing Act (FHA), 42 U.S.C. §3601, *et seq.*

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER45--FAIR HOUSING
SUBCHAPTER I--GENERALLY

§ 3602. Definitions

As used in this subchapter--

(a) "Secretary" means the Secretary of Housing and Urban Development.

(b) "Dwelling" means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

(c) "Family" includes a single individual.

(d) "Person" includes one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, receivers, and fiduciaries.

(e) "To rent" includes to lease, to sublease, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant.

(f) "Discriminatory housing practice" means an act that is unlawful under section 3604, 3605, 3606, or 3617 of this title.

(g) "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, or any of the territories and possessions of the United States.

(h) "Handicap" means, with respect to a person--

(1) a physical or mental impairment which substantially limits one or more of such person's major life activities,

(2) a record of having such an impairment, or

(3) being regarded as having such an impairment,

but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 802 of Title 21).

(i) "Aggrieved person" includes any person who--

(1) claims to have been injured by a discriminatory housing practice; or

(2) believes that such person will be injured by a discriminatory housing practice that is about to occur.

(j) "Complainant" means the person (including the Secretary) who files a complaint under section 3610 of this title.

(k) "Familial status" means one or more individuals (who have not attained the age of 18 years) being domiciled with--

(1) a parent or another person having legal custody of such individual or individuals; or

(2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.

The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.

(l) "Conciliation" means the attempted resolution of issues raised by a complaint, or by the investigation of such complaint, through informal negotiations involving the aggrieved person, the respondent, and the Secretary.

(m) "Conciliation agreement" means a written agreement setting forth the resolution of the issues in conciliation.

(n) "Respondent" means--

(1) the person or other entity accused in a complaint of an unfair housing practice; and

(2) any other person or entity identified in the course of investigation and notified as required with respect to respondents so identified under section 3610(a) of this title.

(o) "Prevailing party" has the same meaning as such term has in section 1988 of this title.

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 45--FAIR HOUSING
SUBCHAPTER I--GENERALLY

§ 3604. Discrimination in the sale or rental of housing and other prohibited practices

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this titlef it shall be unlawful--

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin.

(f)(1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of--

(A) that buyer or renter,[1]

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that buyer or renter.

(2) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of--

(A) that person; or

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that person.

(3) For purposes of this subsection, discrimination includes--

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[1] So in original. The comma probably should be a semicolon.

(A) a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises except that, in the case of a rental, the landlord may where it is reasonable to do so condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted.[2]

(B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling; or

(C) in connection with the design and construction of covered multifamily dwellings for first occupancy after the date that is 30 months after September 13, 1988, a failure to design and construct those dwellings in such a manner that--

(i) the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons;

(ii) all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and

(iii) all premises within such dwellings contain the following features of adaptive design:

(I) an accessible route into and through the dwelling;

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[2] So in original. The period probably should be a semicolon.

(II) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;

(III) reinforcements in bathroom walls to allow later installation of grab bars; and

(IV) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

(4) Compliance with the appropriate requirements of the American National Standard for buildings and facilities providing accessibility and usability for physically handicapped people (commonly cited as "ANSI A117.1") suffices to satisfy the requirements of paragraph (3)(C)(iii).

(5)(A) If a State or unit of general local government has incorporated into its laws the requirements set forth in paragraph (3)(C), compliance with such laws shall be deemed to satisfy the requirements of that paragraph.

(B) A State or unit of general local government may review and approve newly constructed covered multifamily dwellings for the purpose of making determinations as to whether the design and construction requirements of paragraph (3)(C) are met.

(C) The Secretary shall encourage, but may not require, States and units of local government to include in their existing procedures for the review and approval of newly constructed covered multifamily dwellings, determinations as to whether the design and construction of such dwellings are consistent with paragraph (3)(C), and shall provide technical assistance to States and units of local government and other persons to implement the requirements of paragraph (3)(C).

(D) Nothing in this subchapter shall be construed to require the Secretary to review or approve the plans, designs or construction of all covered multifamily dwellings, to determine whether the design and construction of such dwellings are consistent with the requirements of paragraph 3(C).

(6)(A) Nothing in paragraph (5) shall be construed to affect the authority and responsibility of the Secretary or a State or local public agency certified pursuant to section 3610(f)(3) of this title to receive and process complaints or otherwise engage in enforcement activities under this subchapter.

(B) Determinations by a State or a unit of general local government under paragraphs (5)(A) and (B) shall not be conclusive in enforcement proceedings under this subchapter.

(7) As used in this subsection, the term "covered multifamily dwellings" means--

(A) buildings consisting of 4 or more units if such buildings have one or more elevators; and

(B) ground floor units in other buildings consisting of 4 or more units.

(8) Nothing in this subchapter shall be construed to invalidate or limit any law of a State or political subdivision of a State, or other jurisdiction in which this subchapter shall be effective, that requires dwellings to be designed and constructed in a manner that affords handicapped persons greater access than is required by this subchapter.

(9) Nothing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other

individuals or whose tenancy would result in substantial physical damage to the property of others.

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 45--FAIR HOUSING
SUBCHAPTER I--GENERALLY

§ 3617. Interference, coercion, or intimidation

It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title.

Appendix D—Americans With Disabilities Act (ADA), 42 U.S.C. §12101, *et seq.*

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 126--EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES
SUBCHAPTER II--PUBLIC SERVICES
PART A--PROHIBITION AGAINST DISCRIMINATION AND OTHER GENERALLY APPLICABLE PROVISIONS

§ 12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 126--EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

§ 12102. Definitions

As used in this chapter:

(1) Auxiliary aids and services,

The term "auxiliary aids and services" includes--

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) Disability

The term "disability" means, with respect to an individual--

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

(3) State

The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 126--EQUAL OPPORTUNITY FOR
INDIVIDUALS WITH DISABILITIES
SUBCHAPTER IV--MISCELLANEOUS PROVISIONS

§ 12203. Prohibition against retaliation and coercion

(a) Retaliation

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

(b) Interference, coercion, or intimidation

It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

(c) Remedies and procedures

The remedies and procedures available under sections 12117, 12133, and 12188 of this title shall be available to aggrieved persons for violations of subsections (a) and (b) of this section, with respect to subchapter I, subchapter II and subchapter III of this chapter, respectively.

Appendix E—Rehabilitation Act, 29 U.S.C. § 701, *et seq.*

UNITED STATES CODE ANNOTATED
TITLE 29. LABOR
CHAPTER 16--VOCATIONAL REHABILITATION AND OTHER REHABILITATION SERVICES
GENERAL PROVISIONS

§ 705. Definitions

For the purposes of this chapter [29 U.S.C.A. § 701 et seq.]:

(1) Administrative costs

The term "administrative costs" means expenditures incurred in the performance of administrative functions under the vocational rehabilitation program carried out under subchapter I of this chapter [29 U.S.C.A. § 720 et seq.], including expenses related to program planning, development, monitoring, and evaluation, including expenses for--

(A) quality assurance;

(B) budgeting, accounting, financial management, information systems, and related data processing;

(C) providing information about the program to the public;

(D) technical assistance and support services to other State agencies, private nonprofit organizations, and businesses and industries, except for technical assistance and support services described in section 723(b)(5) of this title;

(E) the State Rehabilitation Council and other advisory committees;

(F) professional organization membership dues for designated State unit employees;

(G) the removal of architectural barriers in State vocational rehabilitation agency offices and State operated rehabilitation facilities;

(H) operating and maintaining designated State unit facilities, equipment, and grounds;

(I) supplies;

(J) administration of the comprehensive system of personnel development described in section 721(a)(7) of this title, including personnel administration, administration of affirmative action plans, and training and staff development;

(K) administrative salaries, including clerical and other support staff salaries, in support of these administrative functions;

(L) travel costs related to carrying out the program, other than travel costs related to the provision of services;

(M) costs incurred in conducting reviews of rehabilitation counselor or coordinator determinations under section 722(c) of this title; and

(N) legal expenses required in the administration of the program.

(2) Assessment for determining eligibility and vocational rehabilitation needs

The term "assessment for determining eligibility and vocational rehabilitation needs" means, as appropriate in each case-

(A)(i) a review of existing data--

(I) to determine whether an individual is eligible for vocational rehabilitation services; and

(II) to assign priority for an order of selection described in section 721(a)(5)(A) of this title in the States that use an order of selection pursuant to section 721(a)(5)(A) of this title; and

(ii) to the extent necessary, the provision of appropriate assessment activities to obtain necessary additional data to make such determination and assignment;

(B) to the extent additional data is necessary to make a determination of the employment outcomes, and the nature and scope of vocational rehabilitation services, to be included in the individualized plan for employment of an eligible individual, a comprehensive assessment to determine the unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice, including the need for supported employment, of the eligible individual, which comprehensive assessment--

(i) is limited to information that is necessary to identify the rehabilitation needs of the individual and to develop the individualized plan for employment of the eligible individual;

(ii) uses, as a primary source of such information, to the maximum extent possible and appropriate and in accordance with confidentiality requirements--

(I) existing information obtained for the purposes of determining the eligibility of the individual and assigning priority for an order of selection described in section 721(a)(5)(A) of this title for the individual; and

(II) such information as can be provided by the individual and, where appropriate, by the family of the individual;

(iii) may include, to the degree needed to make such a determination, an assessment of the personality, interests, interpersonal skills, intelligence and related functional capacities, educational achievements, work experience, vocational aptitudes, personal and social adjustments, and employment opportunities of the individual, and the medical, psychiatric, psychological, and other pertinent vocational, educational, cultural, social, recreational, and environmental factors, that affect the employment and rehabilitation needs of the individual; and

(iv) may include, to the degree needed, an appraisal of the patterns of work behavior of the individual and services needed for the individual to acquire occupational skills, and to develop work attitudes, work habits, work tolerance, and social and behavior patterns necessary for successful job performance, including the utilization of work in real job situations to assess and develop the capacities of the individual to perform adequately in a work environment;

(C) referral, for the provision of rehabilitation technology services to the individual, to assess and develop the capacities of the individual to perform in a work environment; and

(D) an exploration of the individual's abilities, capabilities, and capacity to perform in work situations, which shall be assessed periodically during trial work experiences, including

experiences in which the individual is provided appropriate supports and training.

(3) Assistive technology device

The term "assistive technology device" has the meaning given such term in section 3002 of this title, except that the reference in such section to the term "individuals with disabilities" shall be deemed to mean more than one individual with a disability as defined in paragraph (20)(A).

(4) Assistive technology service

The term "assistive technology service" has the meaning given such term in section 3002 of this title, except that the reference in such section--

(A) to the term "individual with a disability" shall be deemed to mean an individual with a disability, as defined in paragraph (20)(A); and

(B) to the term "individuals with disabilities" shall be deemed to mean more than one such individual.

(5) Community rehabilitation program

The term "community rehabilitation program" means a program that provides directly or facilitates the provision of vocational rehabilitation services to individuals with disabilities, and that provides, singly or in combination, for an individual with a disability to enable the individual to maximize opportunities for employment, including career advancement--

(A) medical, psychiatric, psychological, social, and vocational services that are provided under one management;

(B) testing, fitting, or training in the use of prosthetic and orthotic devices;

(C) recreational therapy;

(D) physical and occupational therapy;

(E) speech, language, and hearing therapy;

(F) psychiatric, psychological, and social services, including positive behavior management;

(G) assessment for determining eligibility and vocational rehabilitation needs;

(H) rehabilitation technology;

(I) job development, placement, and retention services;

(J) evaluation or control of specific disabilities;

(K) orientation and mobility services for individuals who are blind;

(L) extended employment;

(M) psychosocial rehabilitation services;

(N) supported employment services and extended services;

(O) services to family members when necessary to the vocational rehabilitation of the individual;

(P) personal assistance services; or

(Q) services similar to the services described in one of subparagraphs (A) through (P).

(6) Construction; cost of construction--

(A) Construction

The term "construction" means--

(i) the construction of new buildings;

(ii) the acquisition, expansion, remodeling, alteration, and renovation of existing buildings; and

(iii) initial equipment of buildings described in clauses (i) and (ii).

(B) Cost of construction

The term "cost of construction" includes architects' fees and the cost of acquisition of land in connection with construction but does not include the cost of offsite improvements.

(7) Repealed. 105-277, Div. A, § 101(f) [Title VIII, § 402(c)(1)(B)], Oct. 21, 1998, 112 Stat. 2681-415

(8) Designated State agency; designated State unit--

(A) Designated State agency

The term "designated State agency" means an agency designated under section 721(a)(2)(A) of this title.

(B) Designated State unit

The term "designated State unit" means--

(i) any State agency unit required under section 721(a)(2)(B)(ii) of this title; or

(ii) in cases in which no such unit is so required, the State agency described in section 721(a)(2)(B)(i) of this title.

(9) Disability

The term "disability" means--

(A) except as otherwise provided in subparagraph (B), a physical or mental impairment that constitutes or results in a substantial impediment to employment; or

(B) for purposes of sections 701, 711, and 712 of this title and subchapters II, IV, V, and VII this chapter [29 U.S.C.A. §§ 760 et seq., 780 et seq., 790 et seq., and 796 et seq.], a physical or mental impairment that substantially limits one or more major life activities.

(10) Drug and illegal use of drugs

(A) Drug

The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C.A. § 812).

(B) Illegal use of drugs

The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(11) Employment outcome

The term "employment outcome" means, with respect to an individual--

(A) entering or retaining full-time or, if appropriate, part-time competitive employment in the integrated labor market;

(B) satisfying the vocational outcome of supported employment; or

(C) satisfying any other vocational outcome the Secretary may determine to be appropriate (including satisfying the vocational outcome of self- employment, telecommuting, or business ownership), in a manner consistent with this chapter [29 U.S.C.A. § 701 et seq.].

(12) Establishment of a community rehabilitation program

The term "establishment of a community rehabilitation program" includes the acquisition, expansion, remodeling, or alteration of existing buildings necessary to adapt them to community rehabilitation program purposes or to increase their effectiveness for such purposes (subject, however, to such limitations as the Secretary may determine, in accordance with regulations the Secretary shall prescribe, in order to prevent impairment of the objectives of, or duplication of, other Federal laws providing Federal assistance in the construction of facilities for community rehabilitation programs), and may include such additional equipment and staffing as the Commissioner considers appropriate.

(13) Extended services

The term "extended services" means ongoing support services and other appropriate services, needed to support and maintain an individual with a most significant disability in supported employment, that--

(A) are provided singly or in combination and are organized and made available in such a way as to assist an eligible individual in maintaining supported employment;

(B) are based on a determination of the needs of an eligible individual, as specified in an individualized plan for employment; and

(C) are provided by a State agency, a nonprofit private organization, employer, or any other appropriate resource, after an individual has made the transition from support provided by the designated State unit.

(14) Federal share

(A) In general

Subject to subparagraph (B), the term "Federal share" means 78.7 percent.

(B) Exception

The term "Federal share" means the share specifically set forth in section 731(a)(3) of this title, except that with respect to payments pursuant to part B of subchapter I of this chapter [29 U.S.C.A. § 730 et seq.] to any State that are used to meet the costs of construction of those rehabilitation facilities identified in section 723(b)(2) of this title in such State, the Federal share shall be the percentages determined in accordance with the

provisions of section 731(a)(3) of this title applicable with respect to the State.

(C) Relationship to expenditures by a political subdivision

For the purpose of determining the non-Federal share with respect to a State, expenditures by a political subdivision thereof or by a local agency shall be regarded as expenditures by such State, subject to such limitations and conditions as the Secretary shall by regulation prescribe.

(15) Governor

The term "Governor" means a chief executive officer of a State.

(16) Impartial hearing officer

(A) In general

The term "impartial hearing officer" means an individual--

(i) who is not an employee of a public agency (other than an administrative law judge, hearing examiner, or employee of an institution of higher education);

(ii) who is not a member of the State Rehabilitation Council described in section 725;

(iii) who has not been involved previously in the vocational rehabilitation of the applicant or eligible individual;

(iv) who has knowledge of the delivery of vocational rehabilitation services, the State plan under section 721 of this title, and the Federal and State rules governing the provision of

such services and training with respect to the performance of official duties; and

(v) who has no personal or financial interest that would be in conflict with the objectivity of the individual.

(B) Construction

An individual shall not be considered to be an employee of a public agency for purposes of subparagraph (A)(i) solely because the individual is paid by the agency to serve as a hearing officer.

(17) Independent living core services

The term "independent living core services" means--

(A) information and referral services;

(B) independent living skills training;

(C) peer counseling (including cross-disability peer counseling); and

(D) individual and systems advocacy.

(18) Independent living services

The term "independent living services" includes--

(A) independent living core services; and

(B)(i) counseling services, including psychological, psychotherapeutic, and related services;

(ii) services related to securing housing or shelter, including services related to community group living, and supportive of the purposes of this chapter [29 U.S.C.A. § 701 et seq.] and of the subchapters of this chapter, and adaptive housing services (including appropriate accommodations to and modifications of any space used to serve, or occupied by, individuals with disabilities);

(iii) rehabilitation technology;

(iv) mobility training;

(v) services and training for individuals with cognitive and sensory disabilities, including life skills training, and interpreter and reader services;

(vi) personal assistance services, including attendant care and the training of personnel providing such services;

(vii) surveys, directories, and other activities to identify appropriate housing, recreation opportunities, and accessible transportation, and other support services;

(viii) consumer information programs on rehabilitation and independent living services available under this chapter [29 U.S.C.A. § 701 et seq.], especially for minorities and other individuals with disabilities who have traditionally been unserved or underserved by programs under this chapter;

(ix) education and training necessary for living in a community and participating in community activities;

(x) supported living;

(xi) transportation, including referral and assistance for such transportation and training in the use of public transportation vehicles and systems;

(xii) physical rehabilitation;

(xiii) therapeutic treatment;

(xiv) provision of needed prostheses and other appliances and devices;

(xv) individual and group social and recreational services;

(xvi) training to develop skills specifically designed for youths who are individuals with disabilities to promote self-awareness and esteem, develop advocacy and self-empowerment skills, and explore career options;

(xvii) services for children;

(xviii) services under other Federal, State, or local programs designed to provide resources, training, counseling, or other assistance, of substantial benefit in enhancing the independence, productivity, and quality of life of individuals with disabilities;

(xix) appropriate preventive services to decrease the need of individuals assisted under this chapter for similar services in the future;

(xx) community awareness programs to enhance the understanding and integration into society of individuals with disabilities; and

(xxi) such other services as may be necessary and not inconsistent with the provisions of this chapter.

(19) Indian; American Indian; Indian American; Indian tribe--

(A) In general

The terms "Indian', "American Indian', and "Indian American" mean an individual who is a member of an Indian tribe.

(B) Indian tribe

The term "Indian tribe" means any Federal or State Indian tribe, band, rancheria, pueblo, colony, or community, including any Alaskan native village or regional village corporation (as defined in or established pursuant to the Alaska Native Claims Settlement Act).

(20) Individual with a disability

(A) In general

Except as otherwise provided in subparagraph (B), the term "individual with a disability" means any individual who--

(i) has a physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment; and

(ii) can benefit in terms of an employment outcome from vocational rehabilitation services provided pursuant to subchapter I, III, or VI of this chapter [29 U.S.C.A. § 720 et seq., 771 et seq., or 795 et seq.].

(B) Certain programs; limitations on major life activities

Subject to subparagraphs (C), (D), (E), and (F), the term "individual with a disability" means, for purposes of sections 701, 711, and 712 of this title and subchapters II, IV, V, and VII of this chapter [29 U.S.C.A. §§ 760 et seq., 780 et seq., 790 et seq., and 796 et seq.], any person who--

(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities;

(ii) has a record of such an impairment; or

(iii) is regarded as having such an impairment.

(C) Rights and advocacy provisions

(i) In general; exclusion of individuals engaging in drug use

For purposes of subchapter V of this chapter [29 U.S.C.A. § 790 et seq.], the term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when a covered entity acts on the basis of such use.

(ii) Exception for individuals no longer engaging in drug use

Nothing in clause (i) shall be construed to exclude as an individual with a disability an individual who--

(I) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal

use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(II) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(III) is erroneously regarded as engaging in such use, but is not engaging in such use; except that it shall not be a violation of this chapter [29 U.S.C.A. § 701 et seq.] for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in subclause M or (II) is no longer engaging in the illegal use of drugs.

(iii) Exclusion for certain services

Notwithstanding clause (i), for purposes of programs and activities providing health services and services provided under subchapters I, II, and III of this chapter [29 U.S.C.A. §§ 720 et seq., 760 et seq., and 771 et seq.], an individual shall not be excluded from the benefits of such programs or activities on the basis of his or her current illegal use of drugs if he or she is otherwise entitled to such services.

(iv) Disciplinary action

For purposes of programs and activities providing educational services, local educational agencies may take disciplinary action pertaining to the use or possession of illegal drugs or alcohol against any student who is an individual with a disability and who currently is engaging in the illegal use of drugs or in the use of alcohol to the same extent that such disciplinary action is taken against students who are not individuals with disabilities. Furthermore, the due process procedures at section 104.36 of title 34, Code of Federal

Regulations (or any corresponding similar regulation or ruling) shall not apply to such disciplinary actions.

(v) Employment; exclusion of alcoholics

For purposes of sections 793 and 794 of this title as such sections relate to employment, the term "individual with a disability" does not include any individual who is an alcoholic whose current use of alcohol prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or the safety of others.

(D) Employment; exclusion of individuals with certain diseases or infections

For the purposes of sections 793 and 794 of this title, as such sections relate to employment, such term does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job.

(E) Rights provisions; exclusion of individuals on basis of homosexuality or bisexuality

For the purposes of sections 791, 793, and 794 of this title--

(i) for purposes of the application of subparagraph (B) to such sections, the term "impairment" does not include homosexuality or bisexuality; and

(ii) therefore the term "individual with a disability" does not include an individual on the basis of homosexuality or bisexuality.

(F) Rights provisions; exclusion of individuals on basis of certain disorders

For the purposes of sections 791, 793, and 794 of this title, the term "individual with a disability" does not include an individual on the basis of--

(i) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(ii) compulsive gambling, kleptomania, or pyromania; or

(iii) psychoactive substance use disorders resulting from current illegal use of drugs.

(G) Individuals with disabilities

The term "individuals with disabilities" means more than one individual with a disability.

(21) Individual with a significant disability

(A) In general

Except as provided in subparagraph (B) or (C), the term "individual with a significant disability" means an individual with a disability--

(i) who has a severe physical or mental impairment which seriously limits one or more functional capacities (such as mobility, communication, self- care, self-direction, inter-personal skills, work tolerance, or work skills) in terms of an employment outcome;

(ii) whose vocational rehabilitation can be expected to require multiple vocational rehabilitation services over an extended period of time; and

(iii) who has one or more physical or mental disabilities resulting from amputation, arthritis, autism, blindness, burn injury, cancer, cerebral palsy, cystic fibrosis, deafness, head injury, heart disease, hemiplegia, hemophilia, respiratory or pulmonary dysfunction, mental retardation, mental illness, multiple sclerosis, muscular dystrophy, musculo-skeletal disorders, neurological disorders (including stroke and epilepsy), paraplegia, quadriplegia, and other spinal cord conditions, sickle cell anemia, specific learning disability, end-stage renal disease, or another disability or combination of disabilities determined on the basis of an assessment for determining eligibility and vocational rehabilitation needs described in subparagraphs (A) and (B) of paragraph (2) to cause comparable substantial functional limitation.

(B) Independent living services and centers for independent living

For purposes of subchapter VII of this chapter [29 U.S.C.A. § 796 et seq.], the term "individual with a significant disability" means an individual with a severe physical or mental impairment whose ability to function independently in the family or community or whose ability to obtain, maintain, or advance in employment is substantially limited and for whom the delivery of independent living services will improve the ability to function, continue functioning, or move toward functioning independently, in the family or community or to continue in employment, respectively.

(C) Research and training

For purposes of subchapter II of this chapter [29 U.S.C.A. § 760 et seq.], the term "individual with a significant disability" includes an individual described in subparagraph (A) or (B).

(D) Individuals with significant disabilities

The term "individuals with significant disabilities" means more than one individual with a significant disability.

(E) Individual with a most significant disability

(i) In general

The term "individual with a most significant disability", used with respect to an individual in a State, means an individual with a significant disability who meets criteria established by the State under section 721(a)(5)(C) of this title.

(ii) Individuals with the most significant disabilities

The term "individuals with the most significant disabilities" means more than one individual with a most significant disability.

(22) Individual's representative; applicant's representative

The terms "individual's representative" and "applicant's representative" mean a parent, a family member, a guardian, an advocate, or an authorized representative of an individual or applicant, respectively.

(23) Institution of higher education

The term "institution of higher education" has the meaning given the term in section 101 of the Higher Education Act of 1965 [20 U.S.C.A. § 1001].

(24) Local agency

The term "local agency" means an agency of a unit of general local government or of an Indian tribe (or combination of such units or tribes) which has an agreement with the designated State agency to conduct a vocational rehabilitation program under the supervision of such State agency in accordance with the State plan approved under section 721 of this title. Nothing in the preceding sentence of this paragraph or in section 721 of this title shall be construed to prevent the local agency from arranging to utilize another local public or nonprofit agency to provide vocational rehabilitation services if such an arrangement is made part of the agreement specified in this paragraph.

(25) Local workforce investment board

The term "local workforce investment board" means a local workforce investment board established under section 2832 of this title.

(26) Nonprofit

The term "nonprofit, when used with respect to a community rehabilitation program, means a community rehabilitation program carried out by a corporation or association, no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual and the income of which is exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986.

(27) Ongoing support services

The term "ongoing support services" means services-

(A) provided to individuals with the most significant disabilities;

(B) provided, at a minimum, twice monthly--

(i) to make an assessment, regarding the employment situation, at the worksite of each such individual in supported employment, or, under special circumstances, especially at the request of the client, off site; and

(ii) based on the assessment, to provide for the coordination or provision of specific intensive services, at or away from the worksite, that are needed to maintain employment stability; and

(C) consisting of--

(i) a particularized assessment supplementary to the comprehensive assessment described in paragraph (2)(B);

(ii) the provision of skilled job trainers who accompany the individual for intensive job skill training at the worksite;

(iii) job development, job retention, and placement services;

(iv) social skills training;

(v) regular observation or supervision of the individual;

(vi) followup services such as regular contact with the employers, the individuals, the individuals' representatives,

and other appropriate individuals, in order to reinforce and stabilize the job placement;

(vii) facilitation of natural supports at the worksite;

(viii) any other service identified in section 723 of this title; or

(ix) a service similar to another service described in this subparagraph.

(28) Personal assistance services

The term "personal assistance services" means a range of services, provided by one or more persons, designed to assist an individual with a disability to perform daily living activities on or off the job that the individual would typically perform if the individual did not have a disability. Such services shall be designed to increase the individual's control in life and ability to perform everyday activities on or off the job.

(29) Public or nonprofit

The term "public or nonprofit", used with respect to an agency or organization, includes an Indian tribe.

(30) Rehabilitation technology

The term "rehabilitation technology" means the systematic application of technologies, engineering methodologies, or scientific principles to meet the needs of and address the barriers confronted by individuals with disabilities in areas which include education, rehabilitation, employment, transportation, independent living, and recreation. The term includes rehabilitation engineering, assistive technology devices, and assistive technology services.

(31) Secretary

The term "Secretary", except when the context otherwise requires, means the Secretary of Education.

(32) State

The term "State" includes, in addition to each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(33) State workforce investment board

The term "State workforce investment board" means a State workforce investment board established under section 2821 of this title.

(34) Statewide workforce investment system

The term "statewide workforce investment system" means a system described in section 2821(d)(2) of this title.

(35) Supported employment

(A) In general

The term "supported employment" means competitive work in integrated work settings, or employment in integrated work settings in which individuals are working toward competitive work, consistent with the strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice of the individuals, for individuals with the most significant disabilities--

(i)(I) for whom competitive employment has not traditionally occurred; or

(II) for whom competitive employment has been interrupted or intermittent as a result of a significant disability; and

(ii) who, because of the nature and severity of their disability, need intensive supported employment services for the period, and any extension, described in paragraph (36)(C) and extended services after the transition described in paragraph (13)(C) in order to perform such work.

(B) Certain transitional employment

Such term includes transitional employment for persons who are individuals with the most significant disabilities due to mental illness.

(36) Supported employment services

The term "supported employment services" means ongoing support services and other appropriate services needed to support and maintain an individual with a most significant disability in supported employment, that--

(A) are provided singly or in combination and are organized and made available in such a way as to assist an eligible individual to achieve competitive employment;

(B) are based on a determination of the needs of an eligible individual, as specified in an individualized plan for employment; and

(C) are provided by the designated State unit for a period of time not to extend beyond 18 months, unless under special

circumstances the eligible individual and the rehabilitation counselor or coordinator involved jointly agree to extend the time in order to achieve the employment outcome identified in the individualized plan for employment.

(37) Transition services

The term "transition services" means a coordinated set of activities for a student, designed within an outcome-oriented process, that promotes movement from school to post school activities, including postsecondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation. The coordinated set of activities shall be based upon the individual student's needs, taking into account the student's preferences and interests, and shall include instruction, community experiences, the development of employment and other post school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation.

(38) Vocational rehabilitation services

The term "vocational rehabilitation services" means those services identified in section 723 of this title which are provided to individuals with disabilities under this chapter [29 U.S.C.A. § 701 et seq.].

(39) Workforce investment activities

The term "workforce investment activities" means workforce investment activities, as defined in section 101 of the Workforce Investment Act of 1998, that are carried out under that Act.

UNITED STATES CODE ANNOTATED
TITLE 29. LABOR
CHAPTER 16--VOCATIONAL REHABILITATION AND OTHER REHABILITATION SERVICES
SUBCHAPTER V--RIGHTS AND ADVOCACY

§ 791. Employment of individuals with disabilities

(a) Interagency Committee on Employees who are Individuals with Disabilities; establishment; membership; co-chairmen; availability of other Committee resources; purpose and functions

There is established within the Federal Government an Interagency Committee on Employees who are Individuals with Disabilities (hereinafter in this section referred to as the "Committee"), comprised of such members as the President may select, including the following (or their designees whose positions are Executive Level IV or higher): the Chairman of the Equal Employment Opportunity Commission (hereafter in this section referred to as the "Commission"), the Director of the Office of Personnel Management, the Secretary of Veterans Affairs, the Secretary of Labor, the Secretary of Education, and the Secretary of Health and Human Services. Either the Director of the Office of Personnel Management and the Chairman of the Commission shall serve as co-chairpersons of the Committee or the Director or Chairman shall serve as the sole chairperson of the Committee, as the Director and Chairman jointly determine, from time to time, to be appropriate. The resources of the President's Committees on Employment of People With Disabilities and on Mental Retardation shall be made fully available to the Committee. It shall be the purpose and function of the Committee (1) to provide a focus for Federal and other employment of individuals with disabilities, and to review, on a periodic basis, in cooperation with the Commission, the adequacy of hiring,

placement, and advancement practices with respect to individuals with disabilities, by each department, agency, and instrumentality in the executive branch of Government and the Smithsonian Institution, and to insure that the special needs of such individuals are being met; and (2) to consult with the Commission to assist the Commission to carry out its responsibilities under subsections (b), (c), and (d) of this section. On the basis of such review and consultation, the Committee shall periodically make to the Commission such recommendations for legislative and administrative changes as it deems necessary or desirable. The Commission shall timely transmit to the appropriate committees of Congress any such recommendations.

(b) Federal agencies; affirmative action program plans

Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch and the Smithsonian Institution shall, within one hundred and eighty days after September 26, 1973, submit to the Commission and to the Committee an affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities in such department, agency, instrumentality, or Institution. Such plan shall include a description of the extent to which and methods whereby the special needs of employees who are individuals with disabilities are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission, if the Commission determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for individuals with disabilities.

(c) State agencies; rehabilitated individuals, employment

The Commission, after consultation with the Committee, shall develop and recommend to the Secretary for referral to the appropriate State agencies, policies and procedures which will facilitate the hiring, placement, and advancement in employment of individuals who have received rehabilitation services under State vocational rehabilitation programs, veterans, programs, or any other program for individuals with disabilities, including the promotion of job opportunities for such individuals. The Secretary shall encourage such State agencies to adopt and implement such policies and procedures.

(d) Report to Congressional committees

The Commission, after consultation with the Committee, shall, on June 30, 1974, and at the end of each subsequent fiscal year, make a complete report to the appropriate committees of the Congress with respect to the practices of and achievements in hiring, placement, and advancement of individuals with disabilities by each department, agency, and instrumentality and the Smithsonian Institution and the effectiveness of the affirmative action programs required by subsection (b) of this section, together with recommendations as to legislation which have been submitted to the Commission under subsection (a) of this section, or other appropriate action to insure the adequacy of such practices. Such report shall also include an evaluation by the Committee of the effectiveness of the activities of the Commission under subsections (b) and (c) of this section.

(e) Federal work experience without pay; non-Federal status

An individual who, as a part of an individualized plan for employment under a State plan approved under this chapter, participates in a program of unpaid work experience in a

Federal agency, shall not, by reason thereof, be considered to be a Federal employee or to be subject to the provisions of law relating to Federal employment, including those relating to hours of work, rates of compensation, leave, unemployment compensation, and Federal employee benefits.

(f) Federal agency cooperation; special consideration for positions on President's Committee on Employment of People With Disabilities

(1) The Secretary of Labor and the Secretary of Education are authorized and directed to cooperate with the President's Committee on Employment of People With Disabilities in carrying out its functions.

(2) In selecting personnel to fill all positions on the President's Committee on Employment of People With Disabilities, special consideration shall be given to qualified individuals with disabilities.

(g) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

UNITED STATES CODE ANNOTATED
TITLE 29. LABOR
CHAPTER 16--VOCATIONAL REHABILITATION AND OTHER REHABILITATION SERVICES
SUBCHAPTER V--RIGHTS AND ADVOCACY

§ 794. Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means all of the operations of--

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 7801 of Title 20) system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship--

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3); any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers

Small providers are not required by subsection (a) of this section to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201 to 12204 and 12210), as such sections relate to employment.